

COMMUNITIES COMMITTEE

Wednesday 8 December 2004

Session 2

£5.00

© Parliamentary copyright. Scottish Parliamentary Corporate Body 2004.

Applications for reproduction should be made in writing to the Licensing Division,
Her Majesty's Stationery Office, St Clements House, 2-16 Colegate, Norwich NR3 1BQ
Fax 01603 723000, which is administering the copyright on behalf of the Scottish Parliamentary Corporate
Body.

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by Astron.

CONTENTS

Wednesday 8 December 2004

Col.

CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) BILL: STAGE 11473

COMMUNITIES COMMITTEE **30th Meeting 2004, Session 2**

CONVENER

*Karen Whitefield (Airdrie and Shotts) (Lab)

DEPUTY CONVENER

*Donald Gorrie (Central Scotland) (LD)

COMMITTEE MEMBERS

*Scott Barrie (Dunfermline West) (Lab)

*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)

*Linda Fabiani (Central Scotland) (SNP)

Christine Grahame (South of Scotland) (SNP)

*Patrick Harvie (Glasgow) (Green)

*Mr John Home Robertson (East Lothian) (Lab)

*Mary Scanlon (Highlands and Islands) (Con)

COMMITTEE SUBSTITUTES

Shiona Baird (North East Scotland) (Green)

Christine May (Central Fife) (Lab)

Mike Rumbles (West Aberdeenshire and Kincardine) (LD)

John Scott (Ayr) (Con)

Ms Sandra White (Glasgow) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Richard Arnott (Scottish Executive Development Department)

Laura Bailie (Scottish Executive Development Department)

Quentin Fisher (Scottish Executive Development Department)

CLERK TO THE COMMITTEE

Steve Farrell

SENIOR ASSISTANT CLERK

Katy Orr

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

Committee Room 6

Scottish Parliament

Communities Committee

Wednesday 8 December 2004

[THE CONVENER *opened the meeting at 09:32*]

Charities and Trustee Investment (Scotland) Bill: Stage 1

The Convener (Karen Whitefield): Good morning. I welcome committee members and visitors to the 30th meeting this year of the Communities Committee. We are joined this morning by a number of Scottish Executive representatives. I welcome Richard Arnott, Quentin Fisher and Laura Bailie, who are all members of the bill team, and Catriona Hardman, who is from the office of the solicitor to the Scottish Executive.

I ask the bill team to give a short introduction to the bill.

Richard Arnott (Scottish Executive Development Department): We thank the committee for inviting us to give evidence today. I am Richard Arnott, the head of the bill team, and I am joined by my deputy Quentin Fisher, Laura Bailie and our solicitor, Catriona Hardman.

This is not the first time that the bill team has appeared before the committee. In June, we had the opportunity to set out the background to the bill and our thinking about the provisions in the consultation paper and the draft bill. I do not intend to summarise again the background to the bill and the discussion in recent years of charity law reform in Scotland.

The consultation has ended and, furthering the Executive's commitment to legislation on charity law reform, we introduced the bill on 15 November. Members will have recognised the bill because its purpose and provisions remain the same as those of the draft bill. The bill seeks to ensure that there is a robust, proportionate and transparent regulatory framework that protects the public interest and meets the needs of the Scottish charity sector. In particular, the bill sets out a Scottish definition of a charity that is based on the principle of public benefit and is compatible with the definition that the United Kingdom Government is proposing.

The bill will turn the Office of the Scottish Charity Regulator from an executive agency into an independent statutory organisation with an enhanced range of powers. The bill will empower OSCR to maintain a publicly accessible statutory register of all charities operating in Scotland and

sets out improvements in the regulation of fundraising, including improved transparency. The bill also sets out a number of other measures that are designed to assist charities' operations.

The bill has changed in a number of ways since the consultation. The Executive received more than 260 responses to the formal consultation, the vast majority of which strongly supported most of the draft bill's proposals. However, several useful suggestions were made and many of those were incorporated into the bill as introduced. In accordance with the Executive's normal consultation procedures, the responses to the consultation and a summary of them will be made available on our website and in the Executive's library.

It might be helpful if I outline briefly some of the main changes to the bill, many of which are a response to points that were made during the consultation. A general equal opportunities duty for OSCR has been added. Those who control charities are to be termed charity trustees rather than stewards and are to be allowed to be appointed as members of OSCR. OSCR's jurisdiction in relation to the registration and regulation of charities has been clarified: any organisation that wishes to call itself a charity in Scotland must register with OSCR, unless it is already registered elsewhere and does not occupy land or premises or carry out activities in an office or shop in Scotland. Hence, any charity with a significant presence in Scotland will have to register here.

The charitable purposes have been changed to bring them more into line with those proposed by the Home Office for the rest of the UK. Criteria have been added to guide the interpretation of "public benefit". Powers have been added to ensure that property that is of national importance but is owned by charities that are removed from the register cannot be transferred to other charities. We have clarified that charity trustees should not normally be paid for trustee duties. The appeals system has been simplified, as have the provisions on charity reorganisations, and provisions on the reorganisation of public trusts have been removed from the bill.

Powers have been added to make regulations to ensure that all fundraisers, including volunteers, professionals and employees, make clear statements to the public when fundraising. Powers have also been added to require the public collection of goods, clothes and so on to be notified to local authorities. Mandatory rate relief for registered amateur sports clubs, which local authorities already give voluntarily, has been added to the bill.

That is not an exhaustive list of the changes, but it is worth noting that much of the structure and

many of the main principles of the bill remain similar to those in the draft bill.

We look forward to attempting to answer the committee's detailed questions on the bill.

The Convener: I am sure that, like me, committee members found that useful, particularly the highlighting of the changes to the bill due to the consultation.

I will start by asking a few questions about OSCR. Will you explain the Executive's reasoning for OSCR's organisation, in particular the decision that OSCR should be a non-ministerial department, which will be regarded as independent although ministers will appoint its members?

Richard Arnott: Yes. It is probably best to summarise what happened. Before the consultation, the bill team formed the bill reference group, which involved representatives of the charity sector in helping us to come up with the bill's format.

We consulted the bill reference group on the different options for forming an independent regulator and then set out in the consultation the different options, which came down to an agency as it is at the moment, a non-ministerial department or a parliamentary commission. The responses to the consultation confirmed our view that the most appropriate form would be a non-ministerial department, which is a tried and tested structure for this kind of regulator and is the form that the Charity Commission in England and Wales takes. It allows more independence from ministers in the operational aspects of the organisation than does a non-departmental public body, for example. In such a public body, it is normal practice for ministers to follow the Nolan public appointments procedures for appointing members, which we feel is the most appropriate and transparent way of choosing the members of OCSR.

The Convener: Some people have suggested that the remit and objectives of OSCR should be included in the bill, which is not the case at the moment. Will you explain why the Executive chose not to respond to those concerns and to include OSCR's objectives in the bill?

Richard Arnott: The general functions and statutory duties of OSCR are set out in the bill. They are:

(a) to determine whether bodies are charities,

(b) to keep a public register of charities,

(c) to encourage, facilitate and monitor compliance by charities with the provisions of this Act, and

(d) to identify and investigate apparent misconduct in the administration of charities and to take remedial or protective action in relation to such misconduct."

We thought that that set out the functions of the organisation, which should be in the bill.

The Convener: Although the functions of OSCR are outlined, the objectives are not, although that has been done in comparable legislation at Westminster. Some people have suggested that such an omission will weaken our legislation. How do you respond to that?

Richard Arnott: It is important to realise the different starting position of the legislation in England and Wales. There, the Charity Commission has existed for a number of years, whereas OSCR is only just starting and this bill sets it up in a new form. It seemed important to us to set out the statutory objectives; the other objectives are possibly more flexible. OSCR will need to set out in its annual reports how it carries out its investigations and its other operational work, and that will be reported to Parliament. We did not feel that it was necessary to include more in the bill.

Mary Scanlon (Highlands and Islands) (Con): I ask for clarification of a particular word that you used. You said that any charity with a "significant" presence in Scotland must register here. Throughout our pre-legislative consultation, we found that there is concern about UK and international charities and about where the money is raised and spent. How do you interpret "significant"?

Richard Arnott: You are right that there was a little confusion about what we are proposing in the responses to the consultation, and perhaps that was not made clear in the draft. We have attempted to address that by taking on board the views of a number of UK charities, many of which said that they had a minimal presence in Scotland. The examples given were of organisations that might have a few members in Scotland and merely send letters to them. Some of the grant-giving charities asked whether giving a grant to a Scottish body would mean that they operated as a charity in Scotland.

We considered the matter further and decided that the important issue is how much of a presence the charity has in Scotland. We thought that if a body is already registered in another territory—with the Charity Commission for England and Wales, for example—does not occupy any land or premises in Scotland and does not carry out activities in an office, shop or similar premises in Scotland, it does not have a significant presence here. Therefore, a charity that is registered in England and Wales and that does not have an office in Scotland would not have to register with OSCR.

09:45

Mary Scanlon: So the basis for determining whether the presence is "significant" is whether a body has office premises here. Are you saying that, in the age of the internet and so on, a body could raise significant amounts of money and carry out significant business in Scotland, but could be excluded from regulation because it does not have an office here?

Quentin Fisher (Scottish Executive Development Department): The organisation would not be required to register with OSCR, but the fundraising provisions later in the bill apply much more widely than just to charities that are registered with OSCR; they include any fundraising by benevolent bodies, and any body that is registered as a charity elsewhere would be considered to be a benevolent body, so the fundraising provisions would cover it.

Mary Scanlon: The issue is important. I wonder whether there is a potential loophole and whether charities could avoid being regulated and inspected by OSCR on the basis that they do not have premises. That was certainly a concern at the three consultation meetings. If an office is required, is there a worry that some bodies could fall through a loophole?

Quentin Fisher: It became clear to us that it was necessary to reach a compromise on the matter because of the examples that Richard Arnott mentioned. Let us consider the example of an existing grant-giving body that operates south of the border, has an office south of the border and sends a cheque once a year to another organisation in Scotland to carry out research. Requiring it to register as a charity seems unnecessary.

Mary Scanlon: With respect, the issue is about fundraising in Scotland. I agree that such a body would not need to register, but I am concerned about bodies fundraising in Scotland without being accountable to the Scottish public, albeit that they do not have offices here.

The Convener: I think that the committee is most concerned about the fact that, using your test, it would be quite reasonable and acceptable for charities that do not have office premises here to function in Scotland without needing either to register with or be regulated by OSCR. I think that most of us have initial concerns about that based on the evidence that we heard in our pre-legislative scrutiny.

Richard Arnott: Perhaps I can clarify matters. OSCR's powers of investigation and powers to take action relate not only to charities. If OSCR considered that a body that was not registered with it was operating as a charity, it could still take investigative and other action against it.

Mary Scanlon: I am sorry, but the body would not be registered, so OSCR would not even know about it. If the body did not have a significant presence here, it would not be registered. Therefore, unless someone brought that body to OSCR's attention, OSCR would not be involved. That is my understanding of the situation.

Richard Arnott: If somebody brought to OSCR's attention any body that pretended to be a charity but was not registered with OSCR, OSCR could investigate it.

Mary Scanlon: So we would have to wait until there were problems before OSCR would get involved.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): I will give an example and perhaps the witnesses can advise me whether or how the body in question would be covered by the legislation. A national children's charity regularly advertises on television. Anybody who watches the advert will think that the charity operates in Scotland, as the advert appears on televisions in people's homes in Scotland. A small note flashes across the screen to say that the charity operates for the benefit of children in England, Wales and Northern Ireland.

I imagine that when people in Scotland see adverts asking them to make a regular monthly donation to the charity, they assume that it operates for children in Scotland. How can we ensure that that charity could be regulated or investigated by OSCR?

Richard Arnott: The charity could certainly be investigated by OSCR. The important point to make is that we are trying to improve the transparency to the public, so it is important that a body explains to the public what it is doing. The fact that no children in Scotland are beneficiaries of the charity does not mean that it cannot raise money in Scotland, as long as it makes it clear to the public and to donors what the money is being used for.

The Convener: The point is that the matter would be brought to the attention of OSCR only if members of the public were concerned enough to bring the organisation to its attention. OSCR would not necessarily know about an organisation that is not registered, unless it had occasion to come across it.

We have no reason to think that the organisation to which Cathie Craigie refers is behaving in an inappropriate fashion. The issue is that there would be a lack of transparency in Scotland because the organisation would be registered in England and Wales but there would be no need for it to register in Scotland. Any fundraising activity would be covered by the Charities and Trustee Investment (Scotland) Bill but, because the organisation has no shop premises or other

premises in Scotland, all other aspects of its operation would not be regulated. Unless we had a concern about the organisation's operation in Scotland, there would be no need for OSCR to become involved. That means that its activities in Scotland would not be transparent. That is the concern of committee members. Perhaps we will have to pursue the issue with the minister.

Richard Arnott: Yes. That could be considered further with the minister.

Scott Barrie (Dunfermline West) (Lab): You indicated that there have been discussions with the Home Office. What discussions did you have with it prior to the inclusion of a set of public benefit criteria in the bill and the slightly different charitable purposes? What discussions do you expect might be on-going between the Scottish Executive and the Home Office, given that two roughly similar bills are going through the two Parliaments at the same time?

Richard Arnott: I will set out the discussions that we had when we were preparing the bill. As you point out, the two bills are being prepared in parallel. We have had regular meetings with Home Office officials and we discussed the policy proposals that we put to our draftsmen and the drafts of the bill that we received from them. We also discussed the impact of the different wordings and what the intentions of the two bills were. We discussed whether there would be differences in practice in what was produced. The Home Office bill has not been introduced to Parliament, so we are not yet in a position to see the final version. However, we are confident from the discussions that we have had with the Home Office that either any differences will be insignificant or we will be able to make progress on the final wording as the bill is developed and in further discussions with the Home Office. Nevertheless, we probably need to accept that a difference between the two definitions could arise because two different parliamentary processes will be involved.

The public benefit criteria that are set out in the bill were discussed with people from the Charity Commission for England and Wales and the Home Office. They were content that the criteria in the bill merely encapsulate existing charity case law in England and Wales and will not create a difference between Scottish charity law and what will be proposed for the rest of the United Kingdom.

Scott Barrie: During pre-legislative scrutiny, a common theme was the fear that we would end up with two different systems. That was a particular concern of charities that operate on both sides of the border. From the discussions that you have had, are you reasonably confident that, as far as possible, that situation will be avoided?

Richard Arnott: The short answer is yes. From the discussions that we have had, we are reasonably confident about that. However, we cannot predict the exact wording of the final legislation, which is in the hands of the two Parliaments.

Mary Scanlon: Under the bill, the advancement of education, the advancement of religion and the prevention and relief of poverty have been removed as criteria that in themselves are sufficient for a body to qualify as a charity. All organisations, regardless of whether they were previously registered as a charity, will be required to satisfy the new public benefit test. However, any appellant of a decision to refuse charitable status will, as a final step, be able to appeal to the Court of Session, which can refer to case law in making its decision on the appeal. Will that mean that an organisation or type of organisation that has previously received a positive decision from the courts will retain its charitable status? Therefore, will the removal of the presumption of public benefit have no practical impact in such cases?

Quentin Fisher: Any Scottish court that considered such a case would look first at the legislation, which will be the new legislation that we are putting in place under the bill. Where that legislation was in any way unclear, the court would consider the common law and precedent. By precedent, we mean decisions on the same point that have been made by courts higher up the hierarchy. Where no such precedent existed, the court would look to decisions by courts lower down the hierarchy, to general discussion in other cases, to obiter dicta and to decisions in courts other than Scottish courts, which is to say English courts. The Scottish courts may consider decisions in English courts, but they will not necessarily be bound by them. The starting point will be the new legislation that we are considering.

Mary Scanlon: I appreciate that. However, precedent could be used to strengthen an appellant's case.

Quentin Fisher: Yes.

Mary Scanlon: I want to restrict my next question to the charity test, as my colleague will deal with the regulation of religious charities later. Having had discussions with religious communities and faith communities, I want to ask how a religious charity would prove that it provides a public benefit. Under chapter 8, a religious charity may be designated as such if it appears that it has "the regular holding of public worship as its principal activity"

and has

"been established in Scotland for at least 10 years".

However, as it was put to me yesterday, how would a monastery in which the monks pray and

worship all day prove that it provides a public benefit to meet the charity test under section 8?

Quentin Fisher: This may not be a helpful answer, but in some ways we will need to wait for OSCR's guidance. The bill sets out that the provision of a public benefit is a criterion that a charity must satisfy, but it does not provide a definition of "public benefit", which has a common meaning. It will be for OSCR, based on its understanding of that common meaning and of the criteria that are laid out in the bill, to set out guidance on how that criterion should be applied. In the event of a disagreement, a decision will be able to be appealed first to the appeal panel and then to the courts, which will need to come to a decision on whether OSCR's interpretation is correct. Frankly, I do not know enough about monasteries to say how they prove public benefit.

10:00

Mary Scanlon: I do not know much about them either. Can you say how public worship is a public benefit?

Richard Arnott: I think that you are referring to the section on designated religious charities.

Mary Scanlon: Yes—I am talking about section 64, which is in chapter 8.

Richard Arnott: That section does not say that they must have public benefit; it lays out criteria that groups must meet to be designated as a religious charity.

Mary Scanlon: The charity test is not clear as to how religious bodies will prove public benefit.

Richard Arnott: I can only reiterate what Quentin Fisher said: it is for the regulator and the courts to interpret that.

Mary Scanlon: The Westminster Joint Committee on the Draft Charities Bill recommended that the draft Charities Bill should include

"a definition of religion ... making it clear that non-deity and multi-deity groups can satisfy the definition of 'religion'".

The committee continued:

"Any organisation would still be subject to the requirement of showing public benefit before it could attain charitable status."

I am not clear how deity or non-deity groups will prove public benefit. I seek the witnesses' guidance on the issue, because I truly do not know the answer. I have been asked that question as I go round the country and I seek a clear steer from you on the issue.

Quentin Fisher: Such groups will have to demonstrate public benefit in the same way that other charities will have to.

Richard Arnott: The benefit will obviously take different forms.

Mary Scanlon: What sort of forms?

Richard Arnott: That is for the charity to demonstrate.

The Convener: You have made your point, Mary, and the Executive officials have made theirs. It is not their job to justify individual charities; their job is to ensure that the charity test in the bill is transparent and can be operated.

Cathie Craigie: To reduce the burden of regulation on charities, section 20 will require OSCR to seek to co-operate with "other relevant regulators" on, among other issues, the sharing of information. Which regulators does that phrase refer to? Will there be a reciprocal arrangement under which regulators will have to share information with OSCR? Will the measures cover UK-wide regulators?

Richard Arnott: It is worth emphasising that OSCR already works closely with other regulators. We aim to ensure that that system continues in order to improve effectiveness and reduce the burden on charities. The Scottish bill will not place duties on UK regulators to co-operate because that would be outside the competence of a Scottish bill. We have had discussions with colleagues in Westminster and with regulators, particularly the Charity Commission—which is an important body from OSCR's point of view—about how to ensure co-operation. We are reassured that the commission is keen to continue the co-operation and that it acknowledges its importance. We are discussing how that system can be ensured.

Cathie Craigie: Will you give some examples of the regulators?

Richard Arnott: The Charity Commission is one obvious UK regulator. Other bodies might be the Inland Revenue, Companies House, the Financial Services Authority, Communities Scotland and the Scottish Commission for the Regulation of Care.

Cathie Craigie: If a reciprocal duty is not placed on UK regulators to co-operate and share information, will that not leave OSCR at a disadvantage?

Richard Arnott: I did not say that a duty would not be placed on the other regulators, but it will not be placed on them by the Scottish bill.

Cathie Craigie: Could you repeat that?

Richard Arnott: No obligation will be placed on UK regulators by the Scottish bill. We are in discussions with Home Office colleagues as to how that can be achieved by other means.

The Convener: On those who are exempted because they are regulated by other bodies, I can understand why somebody might qualify for an exemption because the Charity Commission regulates them, but I am not sure that Communities Scotland is in the same position to be able to regulate with regard to charitable status, because that is not its job. Communities Scotland's job is to inspect and register registered social landlords. Exemptions have been made where they are not necessarily appropriate. I understand the desire not to duplicate but, in our haste to ensure that there is no duplication, I am not sure that some charitable organisations will not fall through the net.

Richard Arnott: The only bodies that are exempt from OSCR's regulation are the RSLs that you talked about. The regulatory powers will be held by Scottish ministers or Communities Scotland. The RSLs will not be exempt from charity regulation. That will be carried out by a different body.

Quentin Fisher: OSCR retains its ability to determine a body's charitability, and charitable status remains with OSCR. That is not being delegated. It is governance and annual monitoring that are being delegated.

Linda Fabiani (Central Scotland) (SNP): I understand the convener's point, because more and more RSLs are registering as charities, and it would be sensible not to have duplication.

I would appreciate your comments on section 38, which refers not only to RSLs but to bodies controlled by them, either singly or jointly, in co-operation with other RSLs. That might be a more difficult situation for Communities Scotland to properly assess.

Richard Arnott: Bodies connected to RSLs are covered for the same reason that OSCR has powers to investigate bodies that are connected to charities. Charities often set up arm's-length bodies with various relationships. We felt that if those bodies are connected to and controlled by a charity, they should be covered by the same regulatory regime. Hence, if an RSL has similarly related connected bodies, they should be investigated in the same way.

Linda Fabiani: I can see that argument, but sometimes—as has happened in the past in particular communities—a housing association or a co-op sets up another body, such as a charity, for something very different from its primary function, for example for youth work or community development. I am willing to be persuaded, but I am not convinced that Communities Scotland or the regulator for RSLs—whoever it may be—should be the same people who monitor, take note of and inspect everything that RSLs set up.

Richard Arnott: We hope that the duty on Communities Scotland and OSCR to co-operate on the regulations covers the point that you raise, but perhaps we could look again at the issue.

Linda Fabiani: Section 38 also applies to "persons acting for or on behalf of any such charity or body."

That takes things a step further—it almost appears to be arm's length from arm's length.

Richard Arnott: As I said, the intention is to ensure that anyone who is connected with a charity is covered by charity regulation.

Linda Fabiani: Okay. Perhaps I came at the question from the wrong angle.

Donald Gorrie (Central Scotland) (LD): I apologise for being late. I do not have a very charitable excuse—I was at my dentist. Some organisations have expressed concern that the bill might lead to the duplication of audit. I will take the example of universities and colleges, all of which are properly audited by their own umbrella organisations and systems. Under the bill, can OSCR accept the audit that has taken place, while still running a check on whether the university or college is providing the charitable function that it says that it is providing? Can OSCR fund its work on the work that is done under the university or college's existing audit obligations?

Laura Bailie (Scottish Executive Development Department): The intention is for the accounts procedures to be based on the statement of recommended practice—the SORP—that is used by accountants. Therefore, other audited accounts will meet the requirements of the bill.

Donald Gorrie: So, we can write to the organisations that have expressed their concerns to us to say that they will not have double auditing.

Laura Bailie: Yes. That is the intention.

Donald Gorrie: I will move to a question on another area of the bill, in which, if I understand the matter correctly—which is a big if—the wording of the bill differs from current practice. Previously, a court that heard a case involving a charity used the test of whether it "appeared" that something was wrong whereas the bill refers to cases where the court "is satisfied" that there has been misconduct. The point has been made to us that that will make it harder for OSCR to take on charities whose conduct is causing concern.

Quentin Fisher: The point is one that has been raised with us before. We have taken advice on it and we are not convinced that that is the case. The "Oxford English Dictionary" was quoted to us to argue that because "appearing" means "clear" or "evident" and "satisfied" means "furnished with

sufficient proof or information” or “convinced”, the use of the word “satisfied” implies some sort of deduction from evidence. It is hard to imagine a court—or, indeed, OSCR, as the same standards apply to any supervisory action that it takes—taking action without first considering the evidence before it.

Donald Gorrie: Right. You have introduced me to a new concept, which is that the law can have anything to do with the “Oxford English Dictionary”; I thought that the law had its own language, which nobody else could understand. This has been a very informative morning. Thank you.

The Convener: I call Linda Fabiani.

Linda Fabiani: Convener, you have covered the issue that I was going to raise—if I do that, you give me a row.

The Convener: Sorry. I call Patrick Harvie.

Patrick Harvie (Glasgow) (Green): I have a question on chapter 6 about the power that ministers are given to establish separate regimes for different types of charities. It has been said that that could be useful for the smaller charities that may have difficulty in complying with some of the provisions. Is any other type of charity being considered for those separate arrangements?

Richard Arnott: Are you talking about section 45, on accounts?

Patrick Harvie: That is right.

Richard Arnott: As Laura Bailie said, it is intended that the detail of our provisions on accounts will be set out in secondary legislation, because experience tells us that it is not always appropriate to set out such detail in a bill. If we included the detail on accounts in the bill, that would make it difficult to move with the times. It is intended that we will consider different thresholds for the different types of accounts that charities might have to produce or for the level of auditing that might be needed. That would be similar to the present arrangements.

10:15

Patrick Harvie: Would the thresholds be based purely on the size of the charity or would certain types of charity be considered for different arrangements?

Richard Arnott: One of our considerations was that we might wish to duplicate the arrangement whereby designated religious bodies are exempt from some of the accounting provisions; they have to provide a different form of accounts. We might well want that to continue. There might be other small differences in the way in which that would be established—for example, the universities would

be covered by a university SORP rather than by a charity SORP.

Patrick Harvie: It has been suggested that the size threshold in Scotland might be different from that in the UK. Will you comment on that?

Richard Arnott: It is possible that the thresholds could be different in Scotland. Some people have argued that the make-up of the sector is very different in Scotland. We would need to consider that and the risk that would be attached to different auditing, for example. We are preparing a consultation paper on the proposals for thresholds and accounting, so we will consult on them.

Patrick Harvie: Do you know what the timescale for the consultation will be?

Richard Arnott: I guess that we would be aiming for spring.

Patrick Harvie: Thank you.

Donald Gorrie: Chapter 7 is about the Scottish charitable incorporated organisations. From my point of view, that is one of the more interesting and constructive parts of the bill. Will you give us a quick standard grade summary of why it would be advisable for charities to go for SCIO status? What benefits will that bring?

Laura Bailie: The main benefit of SCIOs is that they are designed specifically for charities. Charities that become SCIOs will not have to adopt other, not necessarily suitable forms. They will be able to get the benefit of legal corporate personality, but the trustees will not be liable for any debts when the bodies are wound up. That will provide protection for the trustees and will stop people being deterred from becoming trustees.

Donald Gorrie: Will such charities still be adequately regulated by OSCR?

Laura Bailie: They will be regulated by OSCR rather than by Companies House. That will cut down on dual regulation.

Donald Gorrie: I will sneak in another question. Many law firms must be metaphorically sitting on defunct charities, of which my favourite is the one for teetotal tailoresses in Leith—it is defunct because no such tailoresses can be found. Part of the bill deals with the reorganisation of charities. Would it be helpful to insert a provision that said that lawyers who are sitting on charities that are past their sell-by date must bring forward a scheme, or does the bill make adequate provision to ensure that those charities will not just quietly sleep on?

Quentin Fisher: That is adequately covered in the bill. Although no duty is imposed on lawyers in that position, one could argue that the duties that are placed on them as charity trustees may well

prompt them to establish a scheme. If they fail to do that, OSCR could initiate a scheme of its own accord.

We are told—and we believe—that the reorganisation provisions in the bill are a vast improvement on the existing provisions. We expect that there will be a lot of reorganisation in the wake of the bill, especially with regard to smaller charities such as the one you mentioned that effectively have defunct purposes.

Donald Gorrie: So you think that the new system is simple enough to induce lawyers to bring forward schemes.

Quentin Fisher: Yes.

Linda Fabiani: If a charity that has already registered as a limited company were to convert to an SCIO, would the form of accounts—for example, the method of filing annual returns—remain the same?

Laura Bailie: Such a charity would file its accounts with OSCR instead of with Companies House.

Linda Fabiani: Yes, but would it be the same form of accounts? After all, the form of accounts for a limited company can differ from that for a charity. Under these new arrangements, would the form of accounts remain the same?

Laura Bailie: The accounting provision will depend on the consultation but, if it follows the SORP, it should be broadly similar.

Linda Fabiani: So there will be no big changeover.

Laura Bailie: I would not have thought so.

Linda Fabiani: Good.

Patrick Harvie: I have some more questions about religious charities. As far as public benefit is concerned, I accept your point that a religious charity with upwards of zero deities could demonstrate public benefit, depending on its work in a community. However, from my reading of the bill, designating religious organisations removes OSCR's powers to conduct inquiries or to intervene in cases of apparent misconduct and removes some of the Court of Session's powers. If those organisations are receiving the same benefits as other charities, why are they not expected to be regulated on the same footing?

Richard Arnott: The simple answer is that that is the current system and it has not caused any problems. Ministers were persuaded that it was worth continuing with a very similar system.

Patrick Harvie: Saying that it should be done this way because it was done that way before does not really address the question why there

should be a different regulatory framework or situation for one particular set of organisations. Other large charities could argue that they have sufficient internal scrutiny to ensure that problems do not arise. Why has this distinction been made in the first place?

Richard Arnott: It was made mainly because religious bodies have a long-established system of internal controls and a special legal status. However, OSCR can still investigate them and, if it suspects misconduct, could ultimately remove them from the register and take away their special status.

Patrick Harvie: OSCR could indeed do that, but it would be less able to take intermediate steps such as removing an individual from a management position or conducting inquiries.

Richard Arnott: It could conduct an inquiry, but you are correct to say that it could not remove an individual.

Patrick Harvie: It could not remove an individual.

Richard Arnott: No.

Quentin Fisher: OSCR could not remove an individual without first removing the body's designated religious charity status.

Patrick Harvie: You said that OSCR could suspend a body's designated religious organisation status. However, I understand that that status is based on the number of people that the organisation claims to represent and whether it has existed for more than 10 years.

Richard Arnott: An organisation could be removed if it failed to meet the criteria.

Patrick Harvie: Are you saying that that status could be removed because of misconduct or impropriety?

Quentin Fisher: Section 64(5) says:

"OSCR may, by notice ... withdraw the designation of the charity ... where ... in consequence of an investigation ... it is no longer appropriate for the charity to be a designated religious charity."

Mary Scanlon: I have a supplementary question on subsection (5). You say that if misconduct is suspected, the designation of charitable status may be withdrawn. However, if—because of exemptions—less information about accounts and other matters is given than other charities give, how can misconduct be examined, accounted for or proved?

Quentin Fisher: It may help to differentiate information that is supplied regularly—information for monitoring—from information that OSCR seeks in the course of an investigation. The latter is less limited.

Mary Scanlon: Did that cause you concern? Is it not out of kilter with the bill's basic principles of transparency and accountability to have exemptions because it has aye been like that and we must carry on in the same way? The exemptions do not appear to be in line with the basic principles of transparency, accessibility and accountability. Will the public be concerned that some charities provide less information than others do?

Richard Arnott: We proposed the measure in the consultation. Responses in general supported the proposals and said that they were appropriate.

Donald Gorrie: I understand that the Church of Scotland and other churches may be concerned that the bill breaches the settlement in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, which described the churches' independent position on internal management. The bill would allow OSCR to interfere if two congregations were being merged, for example, because each would be a separate charity under the law. Will you reassure churches that the independence of the church from the state will be maintained?

Mary Scanlon: That is a challenge.

Richard Arnott: The basic answer is that the proposals set out some controls for OSCR over religious bodies, but those are more limited. OSCR must be convinced that religious charities have internal control systems.

OSCR should not interfere in a church's governance. Churches have independence on that. If OSCR were convinced that public benefit would still be provided after the merger of two churches and that that was the most efficient way to proceed, that would not be a problem.

Donald Gorrie: Our predecessors fought bloodily in the 17th century and have fought since about such matters. The idea that churches must put their internal affairs past a regulator—however worthy—who is external to the church would cause great concern.

Quentin Fisher: An important principle for many years has been that charitable status is voluntary and that the benefits that one enjoys from having such status attract duties and regulation.

Donald Gorrie: Is it possible to distinguish between OSCR's legitimately ensuring that all charities—religious or otherwise—are delivering the benefits that they say they are delivering, and churches conducting their own internal affairs and maintaining their independence? There is obviously considerable concern, judging by some of the information that is being circulated by the church.

10:30

Richard Arnott: I refer to the example that you gave of two congregations merging. For normal charities, such action would constitute a reorganisation, so they would have to seek OSCR's approval before carrying out that reorganisation. However, that is one of the items from which religious bodies would be exempt. They would have to notify OSCR of a merger because OSCR has to keep the register up to date, but they would not have to seek OSCR's approval.

Donald Gorrie: That is helpful. It is an area that we will have to explore further.

Quentin Fisher: If there is any reassurance to be given, especially in respect of the Church of Scotland, to which you refer, it is that it is already subject to regulation. The 1990 act introduced regulation and made churches subject to regulations because they are charities. The bill continues along the same path.

Scott Barrie: Let us turn to disqualification of charity trustees. The whole committee welcomes the fact that the bill uses the term "trustee" rather than "steward", which caused a fair degree of difficulty for us in considering the draft bill.

Section 68 details the circumstances in which a person will be barred from being a charity trustee. However, "mismanagement" is now subsumed under the definition of "misconduct" in section 103. Several organisations have commented that it seems to be particularly harsh for a person to be disqualified for being found guilty of simple mismanagement, which will be interpreted as misconduct under the provisions of the bill. Can you clarify the reasons behind those proposals? Do you think that there is any merit in what has been said to us by some consultees?

Quentin Fisher: The 1990 act uses the phrase "misconduct or mismanagement"; therefore, under the existing charity regulations, mismanagement and misconduct have been sufficient grounds for action to be taken by OSCR and OSCR's predecessor. All that we are doing is seeking not to lose something of what has gone before in that regard, which is the inclusion of mismanagement in the definition of misconduct.

Scott Barrie: So, existing law encompasses that.

Quentin Fisher: Indeed, yes.

Linda Fabiani: Does existing law include both terms—misconduct and mismanagement—and is it proposed to do away with the term mismanagement and just call it misconduct? To me, there is a difference between the meanings of those two terms.

Richard Arnott: We are not doing away with the term mismanagement; we have merely clarified the fact that the concept of mismanagement is included in the term misconduct.

Linda Fabiani: To tell someone that they are guilty of misconduct is different from telling them that they are guilty of mismanagement: there is a different perception of those two terms. To me—and, I suspect, to many people—a finding of misconduct would make it look as though somebody was doing something that was not quite above board, rather than just getting themselves in a total mess and not submitting their annual accounts on time.

Quentin Fisher: Is there not a—I am sorry: I should not be asking the question. To my mind, mismanagement and bad management are also two different things.

Linda Fabiani: Yes, but “misconduct” sounds dodgy.

Scott Barrie: I have to agree with Linda Fabiani on that. “Misconduct” sounds like somebody is at it—

Linda Fabiani: Yes.

Scott Barrie:—and that they are doing something that is possibly illegal.

Cathie Craigie: And which—

The Convener: I ask that one member speak at a time, rather than the entire committee.

Linda Fabiani: It is so nice to have this degree of unanimity. Cannot we all speak?

Scott Barrie: The word “mismanagement” sounds like minor incompetence. Whether or not the two are one and the same thing, there is a difference in perception of the two in the public eye. It might be a semantic point rather than a legal point, but semantics are important, sometimes.

The Convener: Have you finished your line of questioning?

Scott Barrie: I have.

Mary Scanlon: The UK Government has recommended the establishment of a self-regulation scheme for fundraising, with powers to introduce statutory regulation if necessary. Under what circumstances would a statutory regime be brought in to govern the sector?

Richard Arnott: It is important to understand that there are the beginnings of a self-regulatory scheme at the moment. The Institute of Fundraising already has codes of conduct that members must follow. We aim to improve the system, and the industry itself aims to improve its self-regulation in order to improve public

confidence, which will be in the industry's interests. It is likely that a statutory regime would consist of something similar to what the industry proposes. However, it would be mandatory.

Mary Scanlon: I understand that. I really want an idea of what sort of circumstances you envisage before a statutory regime would be brought in to govern the sector.

Richard Arnott: At the moment, we do not have any specific triggers in mind. We are working with the industry as it develops its proposals for a self-regulatory system. We need to work with the industry to clarify its objectives. If the industry fails to meet those objectives, that may well be the time to introduce a mandatory regime.

Mary Scanlon: One or two bodies asked questions about when a new statutory regime would come in. I realise that this is about fundraising for benevolent bodies, but how would such a regime impact on existing organisations with their own boards of management, trustees and so on?

Richard Arnott: I am sorry—I do not think that I understood the question.

Mary Scanlon: It is to do with the public school sector and other sectors. I realise that this is not to do with fundraising, but if someone else came in to govern that sector, how would that impact on its existing management?

Richard Arnott: If a mandatory fundraising regime were brought in, anybody who was fundraising would have to follow it. Does that answer the question?

Mary Scanlon: I think that we will have to come back to the matter.

The Convener: I understand that Scott Barrie has an outstanding issue to raise.

Scott Barrie: Thank you. A number of respondents commented that the Scottish charity appeals panel will not be strictly independent of the Executive. What provisions are proposed by the bill to ensure the panel's independence?

Quentin Fisher: In providing for the appeals panel, the bill has attempted to take on board the guidance on tribunals, which indicates that the important thing is that members of the tribunal be independent of the body or bodies that are party to the case before the tribunal; that is to say that the charity appeals panel will be independent from OSCR and from the charity that is appealing a decision by OSCR. We believe that the appeals panel will indeed be independent of those two bodies.

Scott Barrie: I accept that but, given that Scottish ministers may make rules as to the practice and procedure of the panel and will

appoint the panel, will it be sufficiently independent?

Quentin Fisher: It is normal for ministers to appoint members of public bodies and tribunals. In doing so they will of course follow public appointment procedure—the Nolan procedure—and will be overseen by the Scottish Law Commission. We believe that the panel will be sufficiently independent.

Linda Fabiani: I suggest that an organisation with the acronym SCAB does not exactly promote confidence in its independence from the Executive. Perhaps a rethink is required of the name “Scottish charity appeals board”.

Quentin Fisher: The body will be called the Scottish charity appeals panel.

Linda Fabiani: It says “board” in our papers, so I take that back. I would like clarification about the investment powers of trustees being extended. Why is that happening and what does it mean?

Quentin Fisher: The Scottish Law Commission, together with the English Law Commission, produced a report that was published in 1999 on trust law matters. The Scottish Law Commission made various recommendations about reform of the investment powers of trustees. Until then, that was governed by the Trustee Investments Act 1961, but it was felt that the provisions of that act were outdated and that reform was needed. The bill is fulfilling ministers’ commitment to implement the proposals.

Linda Fabiani: Does it mean that we will be giving trustees more power to use the money that comes in?

Quentin Fisher: We will. I hasten to add that I am talking about trustees of trusts, not charity trustees. We will give them the power to make investments as they would have if they were the beneficial owners of the assets.

Linda Fabiani: That is what is confusing me. We are talking about trustees of trusts, rather than of charities.

Quentin Fisher: Yes.

Linda Fabiani: Will trusts also be able to become SCIOs?

Quentin Fisher: If the trust in question is a charitable trust, it will be able to become an SCIO.

Linda Fabiani: On one hand we are saying that a trust will be able to be an SCIO because that will mean that trustees have no financial liability if things wind up, but we are also giving trustees more powers to take decisions on how to invest money. Where does that leave the beneficiaries of the trust if mistakes are made?

Quentin Fisher: If a trust were to become an SCIO it would no longer be a trust and the provisions would no longer apply to the trustees.

Linda Fabiani: That is a comfort.

Mr John Home Robertson (East Lothian) (Lab): I offer my sincere apologies for being late, but it is difficult to attend two committees at once.

I have a quick, but rather technical, question about the charities test. Has consideration been given to the case for incorporating into the definition of public benefit some kind of requirement that there not be disproportionate private benefit? Do you see what I mean? Part of the assessment of public benefit should be that there is an absence of private benefit.

Richard Arnott: I see what you mean. That is precisely what we are aiming for in the first of the two criteria that we propose.

Mr Home Robertson: So that provision is in the bill.

Richard Arnott: We believe that it is.

Mr Home Robertson: I apologise for raising that, but it is an important point, which I might want to pursue later.

Linda Fabiani: I have another question, which I forgot earlier, on regulators. The convener prompted me. We talked about Communities Scotland being exempt, or about ministers having the power through Communities Scotland. Why is that the only exemption in the bill? Why were not the Scottish Commission for the Regulation of Care and other agencies not included?

Richard Arnott: That is merely because we believe that Communities Scotland is the only regulator that has the range of overlapping powers that OSCR would have.

10:45

Mary Scanlon: When charities register with OSCR, information will come in every year. There is no doubt that charities will use extremely creative accountants to ensure that what is sent to OSCR, while being open, accessible and accountable, is the information that will satisfy OSCR. I appreciate and support that. However, how can the bill ensure that charities operate effectively, responsibly and appropriately and that they do what they say they will do at local level?

Richard Arnott: That is precisely why we need to establish an independent regulator that will have the resources to enable it to regulate the bodies it will oversee. OSCR will not visit charities, but it will listen to and spot check information that is provided to it. However, we are trying to encourage charities to be transparent to the public

as well as to OSCR. If members of the public notice something suspicious, they should report it.

Mary Scanlon: All of us operate at local level and we regularly hear founded and unfounded criticisms of charities. However, members of the public will have access only to the information that is given to OSCR which, as I said, will be the information that satisfies all of OSCR's criteria. How can we be sure that the process will satisfy needs at local level? How will examination of one set of accounts once a year enable us to be sure that a charity is working well locally? If people have concerns about a charity, the accounts that they will be able to examine will tell them nothing. I am trying to think of how that accountability can be guaranteed.

Richard Arnott: We have tried to set up a balanced system that will not impose an undue burden on charities but will provide the public with a regulator that can answer questions, follow up queries and keep an eye on charities. A balance must be struck.

The Convener: I believe that members have concluded their questioning. I am sure that we will come back to a number of issues over the course of the next few months.

I thank you all for attending and for answering our questions as helpfully as you were able to.

Before I conclude the meeting, I should say that I received apologies from Christine Grahame, who was taken ill and was unable to attend.

Meeting closed at 10:48.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, Scottish Parliament, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Monday 20 December 2004

PRICES AND SUBSCRIPTION RATES

OFFICIAL REPORT daily editions

Single copies: £5.00

Meetings of the Parliament annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75

Annual subscriptions: £150.00

Standing orders will be accepted at the Astron Print Room.

Published in Edinburgh by Astron and available from:

Blackwell's Bookshop
53 South Bridge
Edinburgh EH1 1YS
0131 622 8222

Blackwell's Bookshops:
243-244 High Holborn
London WC1 7DZ
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell's Edinburgh

Blackwell's Scottish Parliament Documentation
Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries
0131 622 8283 or
0131 622 8258

Fax orders
0131 557 8149

E-mail orders
business.edinburgh@blackwell.co.uk

Subscriptions & Standing Orders
business.edinburgh@blackwell.co.uk

RNID Typetalk calls welcome on
18001 0131 348 5412
Textphone 0845 270 0152

sp.info@scottish.parliament.uk

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

Printed in Scotland by Astron