

COMMUNITIES COMMITTEE

Wednesday 12 January 2005

Session 2

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COMMUNITIES COMMITTEE

1st Meeting 2005 Session 2

CONVENER

*Karen Whitefield (Airdrie and Shotts) (Lab)

DEPUTY CONVENER

*Donald Gorrie (Central Scotland) (LD)

COMMITTEE MEMBERS

*Scott Barrie (Dunfermline West) (Lab)

*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)

*Linda Fabiani (Central Scotland) (SNP)

*Christine Grahame (South of Scotland) (SNP)

*Patrick Harvie (Glasgow) (Green)

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

*Mary Scanlon (Highlands and Islands) (Con)

COMMITTEE SUBSTITUTES

Shiona Baird (North East Scotland) (Green)

Christine May (Central Fife) (Lab)

Mike Rumbles (West Aberdeenshire and Kincardine) (LD)

John Scott (Ayr) (Con)

Ms Sandra White (Glasgow) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Janet Allan (Donaldson's College for the Deaf)

Margaret Fowler (Edinburgh Rudolf Steiner School)

Ivan Middleton (Humanist Society of Scotland)

David Mobbs (Nuffield Hospitals)

Judith Sischy (Scottish Council of Independent Schools)

John Stoer (St Aloysius' College)

Vanessa Taylor (Scottish Inter Faith Council)

Janette Wilson (Scottish Churches Committee)

CLERK TO THE COMMITTEE

Steve Farrell

SENIOR ASSISTANT CLERK

Katy Orr

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

Committee Room 4

Scottish Parliament Communities Committee

Wednesday 12 January 2005

[THE CONVENER *opened the meeting at 10:18*]

Item in Private

The Convener (Karen Whitefield): Good morning. I welcome members to the first meeting of the Communities Committee in 2005 and I wish you a happy new year.

The first item on the agenda is consideration of a proposal that item 3, on the committee's approach to its pre-legislative work on the proposed housing bill, be taken in private at the end of the meeting. Do we agree to take item 3 in private?

Members *indicated agreement.*

Charities and Trustee Investment (Scotland) Bill: Stage 1

10:19

The Convener: Item 2 is consideration of the Charities and Trustee Investment (Scotland) Bill. I welcome our panel of witnesses. We are joined by Judith Sischy, the director of the Scottish Council of Independent Schools; Janet Allan, the principal of Donaldson's College for the Deaf; John Stoer, the headmaster of St Aloysius' College; Margaret Fowler, the bursar of Edinburgh Rudolf Steiner School; and David Mobbs, the chief executive of Nuffield Hospitals. Thank you for joining us this morning. I am sure that, like some members of the committee, some of you have had a difficult time getting here and we are grateful to you for making your way to Edinburgh. Members of the committee have a number of questions for you, so I will get started.

I am interested to know whether you think that the Executive's consultation was inclusive and comprehensive and whether sufficient consideration has been given to the responses. The committee has met a number of the organisations that are represented here, but I note that the written evidence to the committee from Nuffield Hospitals expresses dissatisfaction with how it has been involved in the process, so I would particularly like to hear from David Mobbs.

David Mobbs (Nuffield Hospitals): It was unfortunate that we became aware of the process only on 8 December. Although we are happy to be here to help the committee in its consideration of the bill, we have had only a short time to prepare.

John Stoer (St Aloysius' College): I was at the committee's meeting in Perth, which was a good meeting in that we were given a very fair hearing. It was clear that the committee members who attended the meeting wanted to understand our perspective and I was pleased with the quality of the hearing that we received.

The Convener: Did the Scottish Executive engage with you during its consultation and its preparation of the bill?

Judith Sischy (Scottish Council of Independent Schools): On behalf of SCIS, I can say that we were very satisfied. We were part of the Scottish charity law advisory forum, which existed prior to the preparation of the draft bill. It was extremely helpful to hear the general debate on charities, to share ideas—almost with a *carte blanche*—and to have the opportunity to comment on the draft bill as it emerged. The Executive was willing to meet us if we did not understand

something. There has been a good, democratic exercise.

Mary Scanlon (Highlands and Islands) (Con): As you know, it is proposed in the bill that the Office of the Scottish Charity Regulator should become a statutory body, in the form of a non-ministerial department that would report and be directly accountable to the Scottish Parliament. Do the proposals for OSCR ensure the office's independence in the areas that you represent?

Judith Sischy: Our knowledge of the matter is probably limited. I am not 100 per cent sure how a non-ministerial department works. However, I exchanged e-mails with OSCR on the matter and received reassuring responses that the office would be independent. Our main worry is that OSCR must be non-party political. I do not fully understand to what extent ministerial involvement will impinge on the workings of OSCR, but given the Nolan procedures and the other criteria that exist, a regulatory body must be independent and non-party political. We must rely on the structures to create such a body.

Mary Scanlon: OSCR will certainly have to follow the normal public appointment procedures. I do not have the information in front of me, but I picked up from our most recent evidence-taking meeting that ministers would be able to make directions and advise on the annual report. Would that cause the witnesses concern?

John Stoer: The problem that I had when I read through the information that was available to me was that we are all on very new ground. Some of the challenges will relate to definitions of what we understand by "public benefit". Independence is important, but the bill was introduced by the Scottish Executive and is being considered by the Scottish Parliament. Therefore, it would seem that they have reasonable rights to guide the process, but there must also be mechanisms to preserve the independence of the regulatory body.

Mary Scanlon: That will all be known about in time through guidance, regulations and so on. Should objectives for OSCR be included in the bill and should part of OSCR's statutory duties be to provide advice to the sectors that you represent on good governance as well as on adherence with the law?

Judith Sischy: I have read all the evidence that has been given to the committee, and the question whether OSCR should be about compliance, regulation, advice or support and whether a line should be drawn between compliance and advice is interesting. Our sector would certainly appreciate any advice and support that the regulatory body could give about how charities should best be governed and managed. We think that we do pretty well, but it would be nice to have

a nationally acceptable framework within which to operate.

Mary Scanlon: So you would like OSCR to have an advisory capacity on matters other than adherence to the law.

Judith Sischy: As a sector, we would.

John Stoer: I certainly support that. I am involved with teaching children. It is not good enough to tell a child that they have not passed something—what they must do to improve must be explained to them. That is part and parcel of our job. Someone simply regulating without giving advice about good practice seems to be missing an opportunity.

Mary Scanlon: That sounds reasonable.

I have a final question. Is there any sense that OSCR's powers, directions and authority would unduly interfere with your charitable status or the workings of your organisations?

John Stoer: That is a difficult question to answer in the abstract, but I am not unduly worried by what I have heard and read so far.

David Mobbs: From our perspective, the issue comes down to consistency between what happens in England and Wales and what happens in Scotland. There could be difficulties for us if there is no consistency. In our written submission, we have pointed out a number of areas in which the proposals for OSCR seem to go much further than the current proposals for the Charity Commission for England and Wales.

Mary Scanlon: I think that those points will be covered later by my colleagues.

Christine Grahame (South of Scotland) (SNP): Mr Mobbs, in your evidence to the Joint Committee on the Draft Charities Bill at Westminster and in your written evidence to us, you stressed the fact that one of the reasons for Nuffield Hospitals having charitable status is your role as a custodian of property for the public benefit. Do you think that that criterion should be included in the charity test in section 7(2)?

David Mobbs: The point that we were trying to make is linked to the organisation's purpose. The issue has arisen through my advisers and is a technical issue in which I do not have expertise. We have a purpose and have said that legislation should exist to ensure that all our property, including our assets, continues to be applied for that purpose. That was the point that we were making as opposed to specifically identifying the need to protect property itself.

Christine Grahame: So you are saying that you are content with section 7(2) as it stands.

David Mobbs: That is correct.

Christine Grahame: You also state that section 5(1)

“should be recast to oblige the OSCR to register every applicant that satisfies the conditions of the charity test”

in order to make the Scottish situation consistent with that in England and Wales. Is it feasible for OSCR to be aware of every organisation that meets the criteria?

David Mobbs: Again, the issue comes down to the purpose of the organisation. If that purpose is to provide public benefit through the activities that it provides, it is setting out to be a charity and should therefore be registered as a charity so that the legislation can protect all its assets and property in order that they can continue to be applied for the purpose of that organisation. Therefore, it should be registered. The issue comes down to whether it is onerous to have an inconsistency between the two approaches. If registration were automatically recognised from one to the other, that would—

Christine Grahame: We are talking about the perceived discrepancies between England, Wales and Scotland, with which I have no problem. We may have better legislation. Do you concur that it is in the interest of the public to know that charities require to be registered?

David Mobbs: Yes, I do.

10:30

Donald Gorrie (Central Scotland) (LD): Some changes were made between the draft bill and the current bill, many of which have been welcomed. What is your view on identifying public benefit criteria, which is dealt with in section 8(2)? Is that section as well set out as it could be? In particular, how might it impact on fee-paying schools and fee-paying hospitals? It seems to suggest on the plus side that if you are educating or healing people, that is good, but on the minus side the people who pay the fees may be getting an undue benefit, and the public at large may in some way be suffering a disbenefit, because there may be a counter-effect on the education system or the health system as a whole. Is that a reasonable approach to take towards the hospital and school issues? How could it be done better?

Judith Sischy: Perhaps I could start. I am sure that everyone will have something to say. Defining criteria for public benefit is invidious and difficult, but the bill makes a bold and complex attempt to do so. We could spend many hours discussing how one interprets section 8. We found it difficult to work out what it means, and we are only looking at it from our selfish point of view. I suppose that every charitable organisation will do the same. I found it difficult to unpick section 8. It invites you to weigh up section 8(2)(a)(i) against 8(2)(a)(ii), then

the whole of section 8(2)(a) against 8(2)(b), which is not easy to put into practice. However, in principle, having a framework of public benefit is good.

There are various steps to go through, such as drawing up guidance with OSCR and putting it into practice. There will be lots of questions and things to be put right. It will probably all work out in practice. It is not unreasonable to examine and try to quantify public benefit against disbenefit, although some of us are puzzled as to what disbenefit means. However it is interpreted, such a measurement can be made. Part of the problem is that a lot of public benefit is immeasurable because it is intangible. Section 8 is a good attempt and we can work with it, but it needs a lot of work.

John Stoer: I understand the problem—I think that everyone does. The supporting papers that I have read listed three models, ranging from having no definition to nailing it down quite tightly. It is an interesting issue, because defining “public”, let alone “benefit” and “disbenefit”, is a problem.

I will try to answer anecdotally. I have been teaching for 27 years, all bar one term of which has been in the maintained state sector. As a head teacher of an independent school, my aims now are the same as they have been throughout my teaching career. What my colleagues—not just in school but in the profession—and I have done has been for public benefit. I find it hard to understand how good education—in whatever context—could be a disbenefit, because good education is to the public benefit. I have struggled with the issue and have tried to see how one could define “education” in a way that could not be construed as being to the public benefit. While I understand what is being attempted in section 8, I have a philosophical problem with any definition of good education, because axiomatically it is to the public benefit.

The confusion arises where the bill says “unduly restrictive”, which is to do with access. That introduces a different concept into the debate about public benefit that is not strictly relevant to trying to understand what public benefit is.

David Mobbs: Donald Gorrie’s question had a number of parts. The first was about the definition of public benefit in section 8. As our written submission states, we think that that is unclear and we would prefer that the definition of public benefit continued to be the one that is used in the existing and evolving case law, which is the view that has been adopted in England and Wales. Like my colleague, we, too, find it difficult to understand the concept of disbenefit.

I am sorry to keep bringing this up, but we are also concerned about the consistency of approach

between Scotland and England and Wales to the definition of public benefit. It appears from the drafting of the bill that the two will diverge and that the divergence could grow over time because of interpretation, which could cause problems, particularly for charities that are registered in England and Wales but not in Scotland. That will raise questions about what a charity is and when a charity is not a charity, which will raise issues of public confidence and might conflict with the bill's overall objective, which is to protect and develop the charity brand. We have concerns about that.

Section 8(2)(b) states that the service must not be "unduly restrictive". That provision may relate to charities that provide services and charge fees. If the clear intention is to alter the situation for charities that charge fees to provide services, we would prefer the bill to state that, so that we can work early on to resolve the issue. Donald Gorrie has already alluded to the fact that we charge fees.

Donald Gorrie: Do the representatives from Donaldson's College for the Deaf and the Edinburgh Rudolf Steiner School have any comments?

Janet Allan (Donaldson's College for the Deaf): I agree whole-heartedly that we must show what public benefit we provide. However, I am slightly concerned about various issues. Does the term "the public" mean everyone in the public or a sector of the public? My school benefits a small section of society hugely—it is a section that no one else in Scotland is capable of educating. However, I guess that Joe Bloggs in the street may not even know that we exist. There is a problem with what the term "the public" means. Do we have to benefit a certain proportion of the public? There are dangers when we start trying to quantify benefit and disbenefit. I am uneasy with any artificial quantification of something because that gives a pseudo-truth. Charities contribute qualitatively to society. I give a warning about trying to measure artificially things that are unmeasurable.

Margaret Fowler (Edinburgh Rudolf Steiner School): At the Edinburgh Rudolf Steiner School we see the provision of education as having public benefit. However, we offer something different and we think that we have widened the choice. We give parents a choice that is not available in the state-maintained sector. I am a bit puzzled about what the disbenefit could be. How could education possibly be viewed as a disbenefit? By widening the choice, we provide a benefit to all parents. We try to keep our fees as low as possible to provide access to people who would normally not be able to afford an independent education. That must be a benefit.

Patrick Harvie (Glasgow) (Green): It would be a shame if we discussed the issue without asking for your views on one of the arguments in favour of the concept of disbenefit. For me, smaller schools such as the Steiner schools that have sought public funding and have not been able to access it and independent schools that charge very high fees are in markedly different situations. The argument is that to provide the opportunity for a separate system of education that is easily accessible to people who are very wealthy and that is not easily accessible to people who are not very wealthy results in the public experiencing a disbenefit because the articulate, influential and powerful parents of children in that system have no vested interest in having a well-maintained state sector. How does the panel respond to that argument?

Margaret Fowler: At the Edinburgh Rudolf Steiner School, we have very few very wealthy parents. The parents of our pupils make huge sacrifices.

Patrick Harvie: I take that on board. I re-emphasise that, for me, the calculation that is to be made with smaller schools, especially those that wish to access state funding but are not yet able to do so, is different from that which is to be made in relation to larger schools that charge very high fees.

Judith Sischy: It is difficult to answer that question quickly, as it raises many issues for debate. A lot depends on John Stoer's point, which was about how we define "public benefit". We do not accept that the definition of public benefit relates only to the state education system; we think of public benefit as something that relates to the whole nation. Most of us are teachers who are trained to teach children and young people, regardless of where they come from, who they are and whether they are poor or wealthy. We are all happy to be working in the independent sector. It might sound naive to say so, but we are not in the independent sector to make money or to gain profit; we are there to educate children and young people. That is what our training is about. That is why we think that what we do provides a public benefit. Our intention is not to harm the state sector; it is to provide as good an education as we can at a reasonable charge. All that we are doing is charging an economic cost to provide that education.

Patrick Harvie: I do not think that anyone would accept that there is a profit motive involved. That would disbar charitable status.

Judith Sischy: That is the problem with the word "disbenefit"—it is a negative word.

Patrick Harvie: Can I take it that you completely reject any suggestion that an incidental effect—in

other words not something that you are motivated by—of what schools that charge very high fees do is that there is a knock-on impact on the state sector?

Judith Sischy: We are a very small sector; we cater for 4 per cent of the population of schoolchildren in Scotland.

Patrick Harvie: A highly influential 4 per cent.

Judith Sischy: One must discuss why the independent sector is influential. My point is that the issue is complex. I think that the intentions are important.

Patrick Harvie: I will let someone else answer.

Janet Allan: I will speak on behalf of the 12 or so special schools within the SCIS network. I took my school into SCIS because, as a single school in a highly specialised area, isolation is a huge problem for us. We are not part of a local authority network. One of the benefits that we have gained from the SCIS organisation is access to good continuing professional development for our staff. Through interaction with other schools, we can get experiences for our youngsters and some degree of staff training across the sector. That has been highly beneficial to a small school such as mine, which would just float on the waves if there was not some sort of structure to help it.

Linda Fabiani (Central Scotland) (SNP): I want to ask about public benefit, on which I am finding it difficult to understand where the sector is coming from. I am talking about mainstream independent schools rather than specialist schools such as Donaldson's.

Ms Sischy said that public benefit was "intangible". Although I have a certain sympathy for that view, in your submission you state clearly that your organisation believes that

"The benefit gained and likely to be gained by the public is significantly higher than the benefit gained by the charity or by 'members of the charity' in both fiscal/quantitative and non-fiscal/qualitative terms."

What do you mean by that? Will you give us some key examples of how large independent fee-charging schools offer public benefit?

Judith Sischy: Our submission contains pages of examples of the different kinds of public benefit that the schools contribute to society.

10:45

Linda Fabiani: Will you summarise the key benefits that you give to the public?

Judith Sischy: If you would like me to read through the submission—

Linda Fabiani: No, I would just like you to give me some key points off the top of your head.

Judith Sischy: We are there for the advancement of education. Between us, we educate more than 31,000 children, not for personal profit or gain but to try to give those children the best education that we can. The children are from hugely diverse backgrounds. They are not all wealthy, and even if they were wealthy, they would still be entitled to a good education.

Linda Fabiani: What I am trying to get at is how that public benefit is different from the public benefit that any school would give. You say that teachers like working in an independent school because, as a charity, it has a social purpose, it is not for profit and it is dedicated to education. However, mainstream, public-funded, ordinary schools have those same benefits.

Judith Sischy: With all due respect, I have not said that that does not happen in mainstream public schools. Most of us have taught in those schools—of course it is the same. Who would argue that it was not?

Linda Fabiani: I still cannot get where the public benefit is of schools such as this as opposed to state-funded education.

Judith Sischy: John, you try.

John Stoer: The point that you are making is exactly my point. There is no perfect definition of the purpose of education, but if we were to define it, it is to develop a young person to be a responsible citizen—which all schools would try to do—to think clearly, to be able to express themselves clearly and to have consideration for others. Education is not just about learning in the academic sense; there is a community aspect to it as well. That is what we are in the business of and that is what a state school is in the business of. The dilemma that you are putting to us is exactly the right dilemma. The question, however, is whether we can make a distinction between people who, for one reason or another—and not necessarily because they are wealthy—wish to send their children to an independent school rather than go on holiday or have a new car every so many years, and people who do not. Can we make a distinction between people who choose to send their children to independent schools and those who do not, and say that such schools do not therefore have a public benefit? That is the problem that I have. The purpose of education is one—it cannot be divided up. We cannot say that there is a difference between paying for it and not paying for it.

Linda Fabiani: With respect, it is a different kind of education. I have seen the results of that many times.

John Stoer: I have taught in both sectors. It is exactly the same education.

Linda Fabiani: I guess that that is another argument. What I am trying to get at is the justification for charitable status by the proof of public benefit. In very simple terms, how can you justify the public benefit of fee-paying schools?

John Stoer: I would want to put it back to you and ask how you cannot justify it. If we are to say that education is one, it is just a case of parents wanting to pay for it by different means. All parents pay for education. Some people choose to spend their money in a particular way. A colleague asked whether, if all parents had a vested interest in the maintained sector, that would raise the standard of the maintained sector. It might—that is certainly a legitimate argument to be had in this debate. Another side to that, though, is to ask whether it is anti-libertarian to say to people—

Linda Fabiani: We are getting into deep philosophical stuff about whether we agree with private education. All I want you to do is to give me your opinion—which I think that you have now done—about the public benefit of fee-paying schools.

Janet Allan: Could I express an opinion on choice for parents? I have worked for most of my career at the more disadvantaged end of the market, if you like, but I have also worked for a number of years in a mainstream independent school other than Donaldson's. What is clear to me as a professional is that 95 per cent of the job is the same wherever one works and whether the kids one teaches are three or 18: good teaching is good teaching. One of the differences in the independent sector is the independence of its head teachers to meet the needs of their client groups. In most of the independents—I do not have access to all of them—there exists the capacity to educate in ways that meet the needs of their children.

I am not for one minute saying that the state does not do that, but there are kids from all parts of society who do not fit into the main stream. The kids for whom I happen to be responsible are an extreme example; nearly all of them have failed in the mainstream before coming to us. However, I know that other independent schools have niches for youngsters who are struggling. In a utopia, the state might be able to provide everything, but at the moment it does not. Parental choice and involvement are important in all sections of education, whether state owned or independently owned.

Linda Fabiani: You have understood better than the other witnesses what I am trying to get at. You are saying that, collectively, independent schools benefit society. I would have a problem if that benefit was related purely to privilege. Others will comment on these issues.

Margaret Fowler: The Edinburgh Rudolf Steiner School is involved in a couple of initiatives to take the education that it offers into the state sector. We are involved with a local primary school in a future learning and technology project that is funded by the Executive. We exchange ideas and teaching methods and there are pupil and teacher exchanges. The project is working well for both parties; we learn from them and they learn from us. We both take new ideas and methods back to our schools.

We are also involved in an initiative with the City of Edinburgh Council to set up an alternative non-academic curriculum. Much Steiner education is based on hands-on activities such as handicrafts, woodwork, metalwork and arts-based activities. We are setting up a curriculum that would allow state-maintained schools to send children to us one day a week for eight weeks to access those activities. I am talking about children who do not fit into the academic structure. Surely that must be a benefit.

Scott Barrie (Dunfermline West) (Lab): I will keep my question brief, as I am sure that we will return to this point. We can all accept that the educational aims of the independent and state sectors are the same. However, like other members of the committee, I am struggling—from some of the answers that we have received so far this morning—to establish why it is necessary for the independent sector to have charitable status to achieve those aims, when the state sector seems to be able to do so without that status. That is the nub of the issue that we are trying to get at in the bill.

Judith Sischy: I do not know why all schools do not have charitable status. That is no doubt related to the fact that state schools are part of local authorities, which have wider duties. In our view, all schools should have charitable status.

Scott Barrie: That point can be turned on its head. Given that the state sector represents the vast majority of education provision, would it not be better for no school to have charitable status, which would mean that there was a level playing field?

Judith Sischy: I disagree. I do not think that such an approach would fit the proposed legislation.

Scott Barrie: It would achieve the level playing field that you seek, according to the answer that you gave to my first question.

Judith Sischy: If state schools were registered as separate entities, they would have charitable status. They do not have that status because they are part of local authorities.

John Stoer: I cannot speak for the law in Scotland, but I was the head of a maintained school in England that was a registered charity and had all the benefits that accrue from that status. I would be happy to be proved wrong on this, but I am not aware that any benefits would accrue to maintained schools from being given charitable status because they already get all the benefits that are associated with that status. As I understand it, the playing field is level.

The Convener: We have strayed from our original line of questioning. I ask Linda Fabiani to finish her questions on schools. Other members who have questions on this area, such as Christine Grahame, may then comment.

Linda Fabiani: I think that I have covered what I wanted to ask about. I think that John Home Robertson was going to come in on the back of my questions.

The Convener: In that case, I invite Christine Grahame to speak.

Christine Grahame: I have made no criticism of panel members in relation to teaching or their dedication to the teaching profession. That is not the issue for me. In saying what follows, I make a distinction between schools such as the Steiner schools and Donaldson's and schools such as Fettes College, to which my comments will relate.

The issue for me is the elitism of fee-paying schools. The bulk of their pupils are not charitable cases and do not take up assisted places. Their pupils are not always there because of ability; they are there because they can pay—in some schools, they pay a substantial amount. I have no problem with that, if that is the way that society wants things to go, although it might not be the way that I want things to go. What I and the public have a problem with is the fact that those fee-paying schools want to be recognised as charities and to receive the associated benefits. People are astonished to learn that Fettes, Loretto School, Gordonstoun School and so on are charities. People have a clear idea of what charities are for and they do not think that those schools are charities. Not having charitable status would not prevent those schools from providing assisted places or pro bono places, just as solicitors practise pro bono.

Can you see the difficulty that some of us have with the idea that such schools should have charitable status? How can you justify having that status, given the clear view that you are elitist?

Judith Sischy: We have spoken to a lot of you, individually and in groups, so it would be wrong if you thought that we do not understand where you are coming from—

Christine Grahame: I am sure that you do.

Judith Sischy: Of course we understand.

Most of the schools that you mention, whatever they charge now and whoever they educate, were set up as charities. That is their historic background. They were set up to provide education for the needy or for sections of society for whom education was not then available.

Christine Grahame: With respect, that is not the position now. We are looking at the here and now.

Judith Sischy: Equally, you asked a question and I think that it is fair to say that the schools have tried, extremely staunchly—over three or four centuries, in some cases—to adhere to the principles on which they were founded.

These days, everyone has a right to education and, as you say, the state provides most education. However, the schools that we are talking about have continued to exist and seem to provide good education. They have tried not to give up their charitable principles through giving assistance, as far as it can be afforded, to children who cannot afford the fees.

As the law stands, such schools are charities because they provide for advancement of education without personal gain or profit. As they see it, they give back to society more than they receive in terms of public benefit.

Christine Grahame: Do you accept that gaining entry to some of your schools is not necessarily dependent on academic ability but on ability to pay the fee?

Judith Sischy: Every school has its own selection criteria.

Christine Grahame: Are some of your schools like that?

Judith Sischy: None of them takes one approach at all times. They all treat every child as an individual.

11:00

David Mobbs: Much of the debate is focusing on schools. I would like to address some of the points in relation to Nuffield Hospitals. You ask how we can justify our claim to be of public benefit. The submissions that we have provided, including the one that we sent to Westminster, go into some detail on that matter but, in summary, Nuffield Hospitals believes that it provides public benefit intrinsically by preventing and curing sickness, by providing an alternative to the state sector, by providing complementary services to the state sector—we provide some services that the state sector does not—by relieving the pressure on the state sector and by providing confidence and assurance that the things that we do are for those purposes.

Our business model, which you are challenging, is a separate issue. Our organisation's purpose is to prevent, relieve and cure sickness and ill health and we undertake to do that without distributing any of our surpluses or assets to shareholders. We have a choice about how to operate as a business. We could decide to operate by raising funds and giving away our public benefit, but we believe that no hospitals in the UK operate on that basis. It is impossible to provide high standards of modern health care or to expand services to provide public benefit to other communities by fundraising and operating services in that way. Therefore, we choose to charge fees to provide those services.

The questions are therefore how high fees should be and whether fees are too restrictive. Our fee levels represent an economic charge that recovers cost and provides enough surplus for us to reinvest in operations to continue to provide public benefit and to expand public benefit for other communities. Any surplus that we make is temporary, because it must be applied to the organisation's purpose—that is why a surplus exists.

The matter comes down to charging fees and the public perception of fees in relation to the issues in the policy memorandum to the bill of aligning the bill with the common public perception of charity and how we protect the charity brand. If the intention is that there should be no charities that charge fees, that should be said outright so that we can think about alternatives that we can put in place. That would not change our organisation's purpose, which is to provide public benefit and not to distribute its profits and assets; that would continue whatever the situation. Charity law says that if that is the case, the law will protect and regulate that property for the public benefit. The direction in which the bill wants to go must be clear.

We do not see charging fees as being restrictive in our marketplace because people can access our services through insurance, whereby they indemnify the cost of fees over time—a large proportion of the population has insurance—or through cash plans, taking loans or having the state pay for the services that we provide. We provide a significant level of services to help the national health service. If the committee believes that the fee issue is in conflict with the overall charity brand, it must say so.

The Convener: Mr Home Robertson has questions on Nuffield Hospitals. I ask you to start with those, after which you can return to schools issues. That will make it slightly easier for our clerks to keep a record of where we are.

Mr John Home Robertson (East Lothian) (Lab): I am struggling to keep track of the script. I

will give Mr Mobbs the opportunity to cover some of the points in his submission. You have referred to the charity brand and your concern that the bill could create doubts and undermine confidence. What difficulties, if any, will the differences between the Scottish and Westminster bills—especially on provision of care to the elderly, financially disadvantaged disabled people or other disadvantaged people—cause the private health care sector?

David Mobbs: That takes us back to the definition of public benefit in section 8(2). If the definitions of public benefit diverge, Nuffield Hospitals could remain registered as a charity in England and Wales, which would protect its assets for the public under that regime, but would not be registered in Scotland. The question of what would happen to our Glasgow hospital and our Scottish operations is confusing. Would they continue in their current form under United Kingdom tax law? Would the organisation be registered as a charity in England and Wales and continue to operate in Scotland but not be called a Scottish charity? What would happen to the Scottish community that we serve? Would it be denied the protective regime that the Office of the Scottish Charity Regulator could provide the operation? That is confusing.

I return to the point that charitable status does not alter the purpose of Nuffield Hospitals, which continues to be to provide public benefit, not to distribute its profits and to reinvest its surplus in continuing to provide that benefit.

The whole situation is very confusing. The Scottish bill could have an impact on independent health care in Scotland, so Nuffield would have to decide what it would do in Scotland. As we are the only charitable hospitals in Scotland, the bill could have an impact on that.

Mr Home Robertson: You are concerned about the difficulties that could arise from discrepancies between the different charity test criteria.

David Mobbs: Yes, and we are concerned about the definition of public benefit as described in section 8.

Mr Home Robertson: We will have to reflect further on that.

I return to schools. Perhaps I should declare an interest; I happen to be a product of the private education system, albeit the English one.

Linda Fabiani: We rest our case.

Christine Grahame: That was unkind.

Mr Home Robertson: Sorry—I missed that comment.

I confess that I would struggle to defend the proposition that there is a public benefit in private

education, but mercifully that is not what the committee is doing. Our job is to set objective criteria for OSCR to interpret and to apply the test.

Access to schools is obviously a relevant consideration. There seems to be a lot of evidence to say that much of the conventional private education sector is exclusive and predominantly available only to those who can afford it. You have made something of the fact that scholarships and bursaries are available. What proportion of the 31,373 pupils in 2003 in the sector were in receipt of scholarships or bursaries? Perhaps Ms Sischy can help us with that one.

Judith Sischy: On average, the proportion is a minimum of one in 10, but it is possibly more.

Mr Home Robertson: So about nine out of 10 pupils do not receive scholarships or bursaries.

Judith Sischy: Yes.

Mr Home Robertson: That is a weighty consideration. What were the criteria for the award of scholarships and bursaries and how do they compare with general entrance criteria for private schools?

Judith Sischy: In most cases, the general entrance criteria are considered separately from the application for financial assistance, which is means tested. A fairly detailed form asks for details of family income and all the rest of it and it also takes capital into account. The form is used throughout the UK.

Mr Home Robertson: Are there standard academic entrance criteria?

Judith Sischy: No. That is up to individual schools.

Mr Home Robertson: Am I right in thinking that in order to gain a bursary or a scholarship, pupils need to demonstrate that they are of a pretty high standard?

Judith Sischy: That is not necessarily the case; it depends on whether the school is academically selective.

Mr Home Robertson: What proportion of schools are academically selective?

Judith Sischy: It is difficult to generalise about schools' admissions criteria. Most schools say that children have to do a test in English and mathematics at senior 1 entry level and be interviewed. They also look at previous school reports and so on.

One or two of the schools say that they are academically selective, but most say that they have a broad academic selection process. Some have big special needs departments and provide additional support needs. Some schools are

chosen by parents because they are able to offer additional support, because they are able to deal with specific learning difficulties or because they are able to deal with children from disturbed backgrounds.

Mr Home Robertson: I will return in a second to the point about special needs and disabilities. How likely is it that a child of average ability whose parents cannot afford to pay the fees would get a place in one of your mainstream schools?

Judith Sischy: Very likely.

John Stoer: I speak in the specific context of St Aloysius' College, which is in the trusteeship of a religious order. As with all religious orders, there is a clear central directive to have an option for the poor. Sometimes that does not sit easily with running an independent school, as you will appreciate.

It is fundamental that no parent who wishes their child to come to our school will be refused on financial grounds alone. People are refused places at the school, but money should never be the issue in the decision. We want to have a policy—it obviously has to be limited, because resources are limited—of being able to offer a place to any child who would benefit from being at St Aloysius' College, and that benefit is not necessarily academic.

I have been at St Aloysius' College for only a short time, but I am conscious that the children who come in on bursaries and have all their fees remitted include a number of refugee children who we have taken in because of the nature of our school. Contact is often made through the local Catholic parish, or the police may have made a request to the school. As Ms Sischy said, there is no blanket answer to cover every school. In our context, we look at the matter in a different way and I can say without question that although academic criteria are among the factors that we consider, they are not determinant in any way.

Mr Home Robertson: I have a notion that it would be useful to have some more written information on that issue somewhere down the line, but we can correspond on that. I want to give you an opportunity to say a bit more about access for people with special needs.

Janet Allan: I used to be on the senior management team at George Heriot's School, prior to going to Donaldson's College for the Deaf. At Heriot's, I looked after youngsters who have learning difficulties but also those who are foundationers, in the school's terminology—the school takes children whose fathers are dead. The criteria for entry in such cases were actually lower than for fee-paying parents; the criteria relate to a child's benefiting from the education, so the selective nature came out for that particular group

of children. Not only that, but if we could have filled a place with a very able fee-paying child but a less able foundationer child applied, the foundationer got preference. I cannot generalise on the sector because I do not manage it, but I worked for a long time in the system, so I wanted to throw that example into the pot.

Mr Home Robertson: Who gets access at your present school, which is Donaldson's?

Janet Allan: Anyone whom a local authority will pay for can have a place. The difficulty in getting into Donaldson's is much greater for political reasons, in that people have to access the purse strings of their local authority. We have many more applicants than kids who get in because local authorities block the system for financial, ideological or other reasons. However, I think that that is probably for a different debate.

Donald Gorrie: I wonder whether you can help us. Our job is not to do what OSCR does, but to set the rules and the framework under which OSCR can operate sensibly. How can we lay down guidance for OSCR to judge whether particular establishments deliver public benefit? Earlier, Janet Allan said forcefully that quantifying things and ticking boxes is not the right idea. Is it possible to set out aims or general rules by which OSCR can judge each individual school or hospital system, given that—as has been said—they are all different?

Judith Sischy: I am sure that that would be possible. All the schools are different, but they exist within an overall context of similarity in terms of ethos, expectations, objectives, aims and missions. They are all schools: they exist to educate children, to contribute to society and to do the best that they can for their communities in the context of providing education. I am sure that we could draw up guidelines.

Janet Allan: Given the diversity of provision, I envisage that one could establish so many criteria and that a school would have to meet, say, 75 per cent of them. That would allow schools that do a lot of public service to be acknowledged, which is perhaps one way forward.

Donald Gorrie: To be specific, if Donaldson's could demonstrate, for example, that it allowed community groups to play football on its pitch, would that be a plus? Is it reasonable to ask schools to take that attitude?

Margaret Fowler: Most independent schools open their facilities to the general public at evenings and weekends. We have an agreement with George Watson's College under which we use its sports facilities and grounds for our summer races. A Scottish country dancing group uses our hall once a week and a sub-group of the Scottish Chamber Orchestra rehearses in our hall.

All independent schools do that sort of thing already—we all open our doors to the public.

11:15

John Stoer: It is a challenging task to give particular guidance because the situations are so varied—I am not sure that it is possible. I mentioned at the meeting in Perth that St Aloysius' College is particularly concerned with the quality of the buildings that we put up. Our school is in central Glasgow, right next to the Glasgow School of Art, which is one of the centrepieces for tourism in the west of Scotland. We have put up two brand new buildings at huge cost to our trustees and the parents of pupils of the school. Both buildings have won awards—the most recent one won an award as the best new building in Scotland. That is a public benefit to the citizens of Glasgow and to all visitors to Glasgow. Any guidance would need to be couched in a way that could be interpreted. Regardless of the educational issues and the issues of access and allowing other people to use the school, we can make a strong case that we provide a public benefit because of our buildings.

Patrick Harvie: I want to follow up an earlier question from John Home Robertson. I do not call into question the descriptions of the schools that members of the panel have talked about, but is the Scottish Council of Independent Schools, in talking about the separate nature of entrance criteria and applications for financial assistance, saying that there is no independent school in Scotland for which an application for financial assistance is dependent on academic criteria? Are such applications dealt with purely through means testing?

Judith Sischy: I am sorry—could you repeat the question?

Patrick Harvie: You described applications for financial assistance as being decided on a means test and said that entrance requirements were possibly academic but possibly something else. Does that mean that there are no independent schools in Scotland for which an application for financial assistance is dependent on academic criteria? Are those applications dealt with purely on the basis of a means test?

Judith Sischy: The trouble with independent schools in Scotland, and anywhere, is that they are independent. I do not know the detail of every independent school.

Patrick Harvie: So you do not know the answer.

Judith Sischy: I cannot answer.

Patrick Harvie: Thank you. I just wanted to be clear.

The Convener: Linda Fabiani has a quick question. I ask her to follow on with any issues

that are still outstanding from questions 13 and 14, which relate to tax and non-domestic rates relief.

Linda Fabiani: I am happy to do that, but first I want to clear up an issue relating to entrance with financial assistance, which Patrick Harvie and John Home Robertson have mentioned. Some schools are academically selective. I know that the witnesses cannot answer for all schools but, generally, does the academic selectivity that applies to those who receive financial assistance apply to those who pay for their education?

John Stoer: Yes; exactly the same criteria apply.

Linda Fabiani: Is that true generally? If someone applies for a bursary or a means test and the school says that the person must sit an entrance test of their academic ability, does the same entrance test apply to a person who pays the full fees for their education?

Judith Sischy: Yes, unless—as Janet Allan said—they are orphans or fall into a special priority category for means testing or financial help. As I said earlier, scholarships may be given to children who have special needs or particular aptitudes. It depends on what the bursary is for.

Linda Fabiani: What I am trying to get at is whether some people can pay to be in a private school regardless of their academic ability, while others who apply for financial assistance may have to meet an academic test.

Judith Sischy: I imagine that there are probably examples of both.

Linda Fabiani: I have a couple of quick questions on the charitable status issue. Apart from tax and non-domestic rates relief, what benefits does charitable status provide to independent schools as a business?

Judith Sischy: As a business?

Linda Fabiani: Yes.

Judith Sischy: As we have mentioned both today and at our meeting with the committee in Perth, the benefits are as much intangible as tangible. We have never done a systematic analysis of our parental constituency, but it is interesting that mock elections in our schools and school political societies and modern studies societies suggest that the vast majority of our parents vote Labour. Statistically, that is what one would suspect—

Linda Fabiani: With respect, that is not what I am getting at.

Judith Sischy: Let me continue. In that kind of society, it is important to our parental constituency that the schools are not isolated but part of the local community. The fact that independent

schools are charities helps to give parents confidence that the schools are not for personal gain or profit, but are part of the charitable community in Scotland.

Linda Fabiani: A school could operate as a non-profit distributing organisation without being a charity. What are the benefits to independent schools of being designated as charities?

Judith Sischy: Charitable status is an important kitemark for us. It means a lot. As I said, independent schools were set up as charities and see themselves as charities. They do not exist for profit. Being part of the community means a lot to them.

Linda Fabiani: Given that independent hospitals can operate as non-profit distributing organisations, what benefits do Nuffield Hospitals gain from charitable status?

David Mobbs: If I may reinforce Judith Sischy's point, the charity brand confers significant benefits on an organisation because it gives people confidence and assurance that the resources that they provide will be applied solely for the purposes of the organisation and will not be distributed to shareholders. The charity brand also provides assurance about the regulation and protection of assets.

Linda Fabiani: It might do that once the legislation is put in place.

David Mobbs: That happens under the law as it stands. In addition, previous research that we have done has shown that, where public services are being modernised to give people a choice, people prefer a not-for-profit organisation in exercising that choice. As the charity brand is associated with not-for-profit organisations, people have that confidence and assurance. I think that the issue comes down to perception, quite apart from the tax advantages to which you referred.

Linda Fabiani: Let us move away from perception. What financial benefits does an organisation gain from being registered as a charity?

David Mobbs: As we stated in our written evidence to the Westminster Parliament, the financial benefits can be described under three broad headings: corporation tax relief, rates relief and VAT. Those are the three principal areas of relief for hospital operators, but I do not know whether schools receive the same benefits.

Linda Fabiani: I know that the report of the joint committee down at Westminster suggested that independent schools and hospitals should not be registered as charities but should still be able to receive some tax breaks to help them to operate. What is your feeling on that?

Judith Sischy: We feel that that would be unnecessarily complex. Almost the only tax relief that independent schools receive is rates relief. From the returns that I have seen, the schools receive very few other tax benefits. As we said, we have always been charities. I do not see what would be achieved by changing our status.

David Mobbs: It would be possible to establish another not-for-profit sector that was provided with the same tax benefits. We made that point in our evidence to Westminster. If that is the way that the Government wants to go, it should tell us soon, so that we can work with it and help it to do that. However, my earlier point about a divergence between Scotland and England and Wales comes into play. If an organisation that can be registered as a charity in England and Wales must be a not-for-profit organisation in Scotland, that will undermine public confidence in the charity brand. It might also mean that the charity brand is not modernised. Essentially, it would be saying that the charity brand could only be about giving away value and that charities could not charge fees.

Linda Fabiani: I am aware that most members of the public do not realise that private schools and private hospitals are charities. Does the public perception about the benefit of charitable status perhaps give confidence only to those who use such services?

David Mobbs: Our research into the market suggests that, when people choose the independent sector for health care, they do their research. Some people choose Nuffield Hospitals because of the charitable status.

Linda Fabiani: So it is a benefit to those who choose to use the service.

David Mobbs: Yes.

John Stoer: We are the Scottish branch of a much larger charity that is based in England and Wales. No one would assume that we were anything other than a charity.

Linda Fabiani: If you asked the average person in the street whether a private school was a charity, you might be surprised by the answer.

John Stoer: The average person in the street may not even know who we are. If they were to know something about the school, even from past association, they would be hard pushed to think of us other than as a charity, because of our close link with the overall work of the religious order.

Linda Fabiani: Perhaps. We do not have the research to show whether that is the case.

Mary Scanlon: I visited Gordonstoun during the summer and have papers on the school. I know that each independent school is unique, but Gordonstoun is particularly unique.

Christine Grahame: Because of its links with the royal family.

Mary Scanlon: I would be happy to make available to other members of the committee the information that I have. I will not take up the point that my colleague has made. The SNP locally is very supportive of the school. If it is not, that should be made known locally.

Christine Grahame: The issue is charitable status.

Mary Scanlon: Today we have concentrated on the benefits of charitable status, but the process is a two-way one. My scribbled minutes of our meeting in Perth indicate that last year Glenalmond College paid £480,000 in VAT on computers, which it cannot recover, whereas state schools can recover such VAT. We must examine both what independent schools are getting because of their charitable status and the benefits that they provide elsewhere. Today, no one has mentioned the fact that, if the 31,000 pupils that are educated at public schools in Scotland were put into the state school sector, that would cost the taxpayer £155 million. We must ensure that we have a clear debate.

The Convener: Will you get to your question?

Christine Grahame: Mary Scanlon seems to think that she is giving evidence.

Mary Scanlon: I would like to give evidence on the issue, because as a single parent I could not afford to send my children to a private school. I decided to apply for them to go to the High School of Dundee because I liked its management of bullying and discipline. The school was not elitist. I could not afford to pay the full fees, but I am delighted to say that I received help. I am sorry that the assisted places scheme has been abolished, but that is another story.

The Scottish Council for Voluntary Organisations has estimated that independent schools benefit from—

Christine Grahame: You are back on your script.

Mary Scanlon: There is much more that I could say. If we are to be proper, impartial parliamentarians, we need to have a balanced debate and to consider more than one point of view.

The SCVO has estimated that independent schools benefit from non-domestic rates relief to the tune of £2.5 million. The Scottish Executive has amended that figure to £4 million. However, I understand that the schools pay out more than £7 million in scholarships and bursaries. What is the total financial benefit to independent schools from non-domestic rates relief?

Judith Sischy: I can try to answer that question, but it is not easy. We have been very modest today, but we have included all our arguments in written evidence. At the committee's request, we have tried to listen to members' arguments concerning disbenefit and so on. I trust that members will examine the positive representations that we have submitted in writing and I thank Mary Scanlon for alluding to those.

The Scottish Executive has also found it difficult to estimate exactly how much the independent schools receive through the benefit of having charitable status. The figure of £2.5 million that the Scottish Executive, SCIS and the SCVO came up with must be a reasonably accurate estimate of how much the sector receives through rates relief.

The other benefits are extremely difficult to quantify and are probably non-existent, because capital gains tax will arise only in a few circumstances. The figure of £4 million was probably a guesstimate. The main benefit, other than rates relief, would be gift aid on donations made to the schools. Again, any attempt to put a figure on that would be a guesstimate.

11:30

Mary Scanlon: However, if those financial benefits were to be withdrawn as a result of the loss of charitable status, would the independent sector be more elitist and exclusive or would it still be able to bring in children from families with lower incomes in the way that you have described? Would the loss of charitable status make you more or less socially inclusive?

Judith Sischy: It certainly would not help to make us more socially inclusive. The schools are determined to try to continue to be open and accessible to as wide a section of the public as possible. Assisted places are still helping a minimum of one in 10 of the children who attend the schools. If the schools lost the benefit of the money that they receive as a result of having charitable status, they would either be unable to fund those places or would have to raise the equivalent money from other sources, which would probably be the parents.

Mary Scanlon: I note that, when assisted places were lost, the parents who paid the full fees paid 3 per cent more in order to ensure that scholarships and bursaries could continue to be offered. Are you saying that a similar thing would happen if you lost charitable status? Would those who pay fees have to pay more? I stress that those parents already pay twice, because they pay for education through income tax and national insurance and they pay the full cost of school fees as well.

Judith Sischy: They would have to pay more

unless the schools found other ways of raising the funds.

Margaret Fowler: I think that you will find that the bursary funds are ring fenced, so any change would not affect them. The parents who pay the full fees would pay more.

Mary Scanlon: So that would mean that families that could not afford to pay the higher fees or were unable to make the sacrifices that that would require would be excluded.

Margaret Fowler: Yes. Of course, that would put more pressure on the state system.

Mary Scanlon: Of course it would.

David Mobbs: The impact on investment should not be underestimated. If the tax relief is lost, the impact might be not only on fees but on investment. Nuffield Hospitals has invested considerably more than the cash that we have generated in Scotland. If we were unable to make that investment, there would be a considerable impact on our continuing operations.

John Stoer: Similarly, St Aloysius' College owns nothing; everything is owned by the charity of which we are a part. It has some land that it is considering selling for the sole purpose of building a sports hall on our site. Because the organisation is a charity, all of the proceeds of that sale will go towards building the sports hall. If charitable status were lost, we would be unable to invest in the site. The investment in the site will benefit our pupils but, as a result of negotiations to do with building a sports hall, it will also benefit all the residents of Garnethill, who will have access to the sports hall outwith school hours. The removal of charitable status would have knock-on effects on investment in the school and, by implication, on benefits that might accrue to the local community.

Mary Scanlon: The same situation applies with regard to Gordonstoun.

Judith Sischy: Analysis of our parental constituency reveals that around 40 per cent are what we call first-time buyers, which is to say that they did not go to an independent school themselves. A much larger percentage of the children than was previously the case comes from families in which both parents are working. Every time there is something in the press or a parliamentary report about the schools being for toffs or wealthy pupils, we get a huge number of responses from the parents, saying, "We are not toffs. We are not wealthy. We are hard-working parents who are doing the best, as we see it, for our children."

Mary Scanlon: The trade union member at our visit to Perth in November made that case very strongly.

Judith Sischy: That is right.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): I want to pick up on Mary Scanlon's point about paying twice. The point came up at the meeting in Perth and I took issue with it. Many of us choose not to use public services but still pay for them. For example, people who do not have any family still pay for the education system through their taxes. The argument about paying twice is very weak.

This morning, we have strayed from scrutiny of the bill and, rather than getting down to the details, we have witnessed some showboating. My colleague John Home Robertson reminded us that it will be for OSCR to decide which organisations—regardless of whether they are schools or small community groups—meet the public benefit test. Let us hope that the committee can be correct about that when it reports on the bill.

I felt that I had to make those points because I have been so quiet on other issues. The committee has to get its head round those points.

Chapter 3 of the bill is on co-operation and the information that will be available through OSCR. An effort will be made to reduce the additional burden of regulation on charities and section 20 requires OSCR to seek to co-operate with other "relevant regulators" and to share information. Will that be useful? Will OSCR be looking for information that you have already given to other organisations, leading to duplication? Will OSCR be asking charitable organisations questions that it would be more appropriate for another regulatory body to ask?

Judith Sischy: It is absolutely right that there should be a public register of charities, so we have no problem with working with, and giving information to, OSCR as a regulatory body. There is no such body at the moment for charities. However, we have on several occasions given evidence to the Parliament's Education Committee about the fact that schools are hugely regulated and that, in our view, there is enormous and unnecessary bureaucracy and duplication. If there were—we are working with the Executive on this at the moment—an electronic database that all the regulatory bodies could share, that would be sensible, time saving and much appreciated. The lines of accountability are enormous and all encompassing. Somebody should be in the middle to say, "Right, we're all giving the same information to six bodies in Scotland. Can we not share it?"

I do not doubt that, as a charities regulator, OSCR will need some information that the Scottish Commission for the Regulation of Care, for example, might not need and vice versa. However,

we would be happy to co-operate on a system that saves time, effort and money.

John Stoer: Anything to reduce bureaucracy in any institution has to be a good thing. I can always remember receiving, as a head teacher, David Blunkett's 50-page document on bureaucracy busting. It makes good sense to share, and to give information only once. However, I appreciate that achieving that is another matter altogether.

Cathie Craigie: Judith, did you say you were working with the Scottish Executive?

Judith Sischy: Yes—we are working with the Scottish Executive, the Scottish care commission and Her Majesty's Inspectorate of Education on that issue.

Scott Barrie: As you may know, the bill indicates circumstances in which a person may be barred from being a charity trustee. One of the criteria is mismanagement, which has been subsumed under the category of misconduct. At previous evidence-taking sessions, a number of organisations commented that they thought it unduly harsh for someone to be barred from serving as a trustee because of simple mismanagement, as opposed to misconduct. Do the organisations that you represent have a view on that issue?

Judith Sischy: SCIS has not really considered the matter. We have certainly considered the need for good management and good conduct in our duties as trustees of charities. There are huge parallels between that issue and the issue of misconduct and mismanagement by teachers. I should have thought that misconduct and mismanagement were very different, but that is just a personal view.

John Stoer: The general principle that the bill seeks to establish is sensible. I do not know how mismanagement would be defined. However, it is crucial for the running of any school or charity that trustees and governors who act on their behalf should be beyond reproach. Guidance on that matter would be helpful.

Christine Grahame: Can you clarify the VAT status of independent schools? Is it the same for them all or is it different for different schools? You did not address that issue in your submission.

Judith Sischy: We did not mention it both because it is extremely complicated—I am not an accountant—and because it is not related to our status as charities. Education is exempt from VAT, which may explain why our situation is different from that of hospitals. The issue has nothing to do with charitable status and is not particularly relevant to this debate.

Christine Grahame: I wondered about the matter because it was raised.

Judith Sischy: Any educational establishment is exempt from VAT because of the European exemption for education.

Mr Home Robertson: I return to an issue that I raised earlier. I understand why you want to emphasise the best examples of public access to private schools. It would be useful if you could provide us with some detailed information. It would be helpful to the committee if you could let us have a note on the number of bursaries and scholarships that are offered by individual schools.

Judith Sischy: We are collecting some case studies, which we hope to have by 24 January. Those may be helpful to the committee.

Mr Home Robertson: Some numbers and a summary of the criteria for access would be relevant to our considerations.

Judith Sischy: That is no problem.

The Convener: I thank the Nuffield Hospitals and SCIS for submitting written evidence to the committee in advance of the meeting. All members found that especially useful. I am grateful to everyone for attending and ensuring that they were able to get here on time in what for many were difficult circumstances.

As you will have gathered from members' comments, the committee has reached no final conclusions on this matter and there are widely divergent views. Those will all be taken into account during our final deliberations on the bill. I trust that you will continue to view and take an interest in the committee's discussions in coming weeks.

The meeting will be suspended for a five-minute comfort break, after which we will take evidence from the second panel of witnesses.

11:43

Meeting suspended.

11:52

On resuming—

The Convener: I welcome the second panel of the morning. I know that the witnesses sat through the first session and I am grateful to them for their forbearance. With us are Vanessa Taylor, the policy and equalities officer at the Scottish Inter Faith Council; Janette Wilson, secretary of the Scottish Churches Committee; and Ivan Middleton, the secretary of the Humanist Society of Scotland.

I thank them for attending the committee this morning. I start by asking a question similar to the one that I asked the first panel, on the consultation that the Executive undertook in drawing up the

legislative proposals. Are you satisfied that you were consulted effectively and are you confident that the Scottish Executive took on board the responses that it received and reflected them in the bill?

Janette Wilson (Scottish Churches Committee): We are grateful to the Scottish Executive for the efforts that it made to consult fully the Scottish Churches Committee, which included sending along a member of the bill team to speak to us. We are pleased that the Executive took on board some of our responses following that meeting. Sadly, we did not manage to bend it entirely to our will, but—

The Convener: There is time yet.

Janette Wilson: Yes.

Ivan Middleton (Humanist Society of Scotland): The Humanist Society of Scotland is pleased to be included in the consultation exercise and will make a written submission by 24 January.

Vanessa Taylor (Scottish Inter Faith Council): We, too, were satisfied with the consultation process and the fact that the bill team made itself available to us.

Mary Scanlon: Do you think that the form that is proposed for OSCR in the bill will ensure its independence?

Janette Wilson: The answer to that is that only time will tell. Under the bill, Scottish ministers and the Scottish Parliament will be able to exercise control over certain matters. It remains to be seen how far those bodies will resist the temptation to exercise control when it is not appropriate to do so.

Mary Scanlon: I have another question on that issue. Last night, I was religiously going through the papers—

Janette Wilson: You get my vote.

Mr Home Robertson: I hope that Mary Scanlon was on her knees.

Mary Scanlon: I was particularly interested in the information on the Church of Scotland. Most Joe Averages do not know much about the Church of Scotland Act 1921, but you have given me an opportunity to ask about it. Your submission states:

"It is hard to imagine powers which could potentially interfere more with matters relating to the government of the Church of Scotland than"

the powers that are to be given to the Court of Session. You go on to state:

"Church courts are the appropriate fora for adjudication of all matters of ecclesiastical law, including matters relating to discipline, government, membership and office in the Church".

Something that I found a bit difficult to comprehend was in the declaratory articles, acknowledged in the Church of Scotland Act 1921, which state:

"This Church, as part of the Universal Church wherein the Lord Jesus Christ has appointed a government in the hands of Church office-bearers, receives from Him, its Divine King and Head, and from Him alone, the right and power subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine".

Is the possibility of interference in the church by the state really as bad as your submission states?

Janette Wilson: My submission tries to explain the background and where we are now. The proposal is that we move from designated religious body status to designated religious charity status. When the consultation on the draft bill was published, it seemed to the Scottish Churches Committee that the old powers of the Scottish Charities Office and the Court of Session that had been disappplied in the case of religious bodies were to continue to be disappplied, but that there was to be no disapplication of the new powers that were to be given either to OSCR or to the Court of Session. In some cases, it is difficult to draw the line between matters that are appropriate for civil authorities and those that are appropriate for church authorities, but the Church of Scotland's view, which the Scottish Churches Committee endorses, is that some aspects of the bill—as highlighted in our submission—cross the line.

We could get into a situation in which neither body will accept the jurisdiction of the other. The Church of Scotland Act 1921 is an interesting legislative animal because the Church of Scotland is the only body that has legislative recognition of its independent spiritual jurisdiction. However, the wording of the act and the declaratory articles assert that other religious bodies in Scotland also claim such a jurisdiction, and that is certainly the view of the members of the Scottish Churches Committee.

Mary Scanlon: So your submission argues that the bill oversteps the mark. It states that the use of the powers of the Court of Session would

"rapidly prevent the Church from continuing to function at all."

Janette Wilson: That is certainly true of section 34(4)(g), under which an order might be made

"restricting the transactions which may be entered into".

The Court of Session will also have the power to

"order any relevant financial institution ... holding property ... not to part with the property".

Obviously, if the church could not access its bank accounts and pay its ministers and so on, we could not realistically continue to function for long.

Therefore, that measure would affect the government and continuation of the church.

Mary Scanlon: Your submission contains a copy of the declaratory articles acknowledged in the Church of Scotland Act 1921, which state:

"Any proposal for a modification of or addition to these Articles"

must be approved by the General Assembly of the Church of Scotland in

"at least two immediately successive years."

If a proposal does not receive consent, it must be held back for five years. Given that the bill will have a significant impact on the church, do the measures have to be approved by the General Assembly? Can you give me an idea of the relationship?

12:00

Janette Wilson: The Church of Scotland is a bit like the UK, in that there is no single document that could be called the church's constitution. There are various documents, many of which are of historic significance, which, taken together, could be said to constitute a constitution. If one is looking for a shorthand version of the constitution, the articles declaratory that were passed in advance of the union of 1929 are the closest that one will get. They declare that it is for the church to amend its constitution and set out a procedure for doing so. Many checks and balances are built into that procedure. The Barrier Act 1697 states that any General Assembly legislation that could be said to impinge on the areas of doctrine and government has to be approved by the presbyteries before coming back to a second General Assembly. Paragraph VIII of the articles declaratory sets out an even tighter provision for a two-stage reference procedure. However, over and above that, it makes it clear that that provision cannot affect the most important part of the declaratory articles, which is paragraph I.

Mary Scanlon: On page 11 of our paper COM/S2/05/1/3, which contains the written evidence, we read that the articles declaratory say that the church receives from

"its Divine King and Head, and from Him alone, the right and power ... to adjudicate finally, in all matters of doctrine, worship, government, and discipline in the Church"

and that it is in the power of no civil authority to legislate in that regard.

As you say, the legislative background is complex. Are you saying that the church is in a position to challenge or not accept legislation that is passed by the Scottish Parliament?

Janette Wilson: Yes. I think that it is accepted that the 1921 act was an acknowledgement by the

Westminster Parliament that there are certain areas within which its writ does not run. By extension, the same thing must apply to the Scottish Parliament. Therefore, if there were a circumstance in which the church said that something was a matter for it to decide on and the Office of the Scottish Charity Regulator or the Court of Session were saying that that was not the case, the courts would be placed in the difficult situation of having to sort out which arena the particular provision fell within. It is of concern to me that the provision that I have highlighted might cross the line. Certainly, it is analogous to the provisions that Westminster exempted in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 for the reason that I have outlined.

Mary Scanlon: That is interesting.

Janette Wilson: Yes, it is. Constitutional and ecclesiastical lawyers find this stuff wonderful.

Mary Scanlon: Deciding whether Jesus Christ or the Scottish Parliament is the leading authority in relation to the provision would be a lawyer's paradise.

Janette Wilson: Someone rather flippantly asked me whether, since Jesus Christ is the head of the Church of Scotland, he will be a charity trustee. By extension, one might also ask whether Queen Elizabeth is going to be a charity trustee of the Church of England.

The situation shows that, because of their history and the way in which they organise their business, churches have unusual structures and, because of that, rather specialised issues can arise.

Mary Scanlon: I am grateful to you for clarifying the issue.

Janette Wilson: I hope that I managed to make it clear. As I say, it is not an easy area. I think that the issue comes as a surprise to parliamentarians. Donald Dewar made an excellent address to the House of Commons when there was concern about how human rights legislation might impinge on the church's jurisdiction. He commended the language that was used in the articles declaratory and in the bill with which he was dealing. With no disrespect, I would say that the same standard has not been reached in the bill that we are discussing.

Mary Scanlon: We will come back to that issue at a later date as the number of questions that I can ask today is limited. It is interesting that the church can challenge the legislation of the Parliament.

Cathie Craigie: I am confused. Do the articles declaratory relate to the governance of matters within the church?

Janette Wilson: Yes. They relate to matters of doctrine, worship, government and discipline and state that Parliament should not legislate on areas that might impinge on those areas.

Cathie Craigie: But that is not what Parliament is doing. Further, as a member of the Church of Scotland, I cannot imagine that the church would not accept legislation that was enacted by this Parliament or the Westminster Parliament. I do not think that that is what the articles declaratory say.

Janette Wilson: Perhaps the most straightforward example relates to paragraph IV of the articles declaratory, as approved. After the reference to doctrine, worship, government and discipline, it goes on to talk about

"the right to determine all questions concerning membership and office in the Church".

Ministers, elders and so on who are office holders in the church are charity trustees. There was some concern in 1990 that there might be a power for the Court of Session to suspend ministers and other office holders, which would interfere with the church's right to determine questions concerning membership and office holding in the church.

The Convener: I seek clarification on that point. Would not somebody be suspended only on the ground that they were not suitable to be a charity trustee? They would not necessarily be suspended as a minister of the Church of Scotland or, for that matter, a minister of any religious denomination.

Janette Wilson: If someone is a minister, in the law of the church they are the moderator of the kirk session of the congregation. Clearly, that body is in control of the charity, which is the congregation. How could the minister continue to moderate the kirk session if he was not a charity trustee?

The Convener: That is a matter to which we will have to give further consideration.

Donald Gorrie: I wonder whether we can get Janette Wilson's views on behalf of the churches and the interfaith organisations as a whole. Changes were made to the draft bill to arrive at the bill that is before us. On the whole, have those changes been helpful? Have there been any changes that are not helpful? In particular, is the endeavour to clarify the public benefit criteria successful, or would you like to suggest any changes to it?

Janette Wilson: I am going to annoy Ms Grahame, but the view of the Scottish Churches Committee is that we prefer the overall approach that Westminster has taken, to continue existing charities as such and not potentially to throw the baby out with the bath water—as appears to be the situation here—by saying that there can no

longer be reference to precedent and the common law in determining definitions and issues relating to charitable status. I also feel that some charities might fall through the net.

Wearing another hat, I am a charity trustee of a garden. Part of the reason why we got charitable status was based on the Recreational Charities Act 1958. Charities that were created under that legislation are preserved in the Westminster bill, but there is no reference to that in this bill. Looking through the list of criteria, I can see categories under which gardens might qualify. However, organisations in the charitable sector will face uncertainty about whether they meet the charity test by coming under one of the charitable purposes that are set out in the bill. The Scottish Churches Committee had a long debate on the subject of whether it would be helpful to have criteria and concluded that they would be difficult to define. It also thinks that the wording in the bill is not awfully helpful.

I hate to say this, but members of the Scottish Churches Committee also do not like the word “disbenefit”. An accountant explained to them that disbenefit is based on a cost-benefit analysis. The committee’s view is that, whatever religious bodies are, they are not businesses—indeed, they could also be said not to be businesslike. How can a body like OSCR be asked to assess religious bodies and other bodies on the basis of a disbenefit test? Will the test be subjective? How will it work in practice? I will be interested to know whether OSCR will go through each and every congregation to analyse what work it does—for example, whether it does outreach in its communities or raises funds for other charities. Will OSCR put ticks in various boxes for each congregation, or will it simply say, “As the Scottish Episcopal Church has passed the test, all of you are in”? There is a lot of uncertainty, which is probably inevitable given the clean-sheet approach that is being taken.

Uncertainty is also created by the removal of the presumption of public benefit. What will that mean in practice? I am aware that the presumption was always rebuttable. There have been very few cases in Scotland, but there have been a few cases in England in which bodies that might have been looked on as being fringe religions failed the public benefit test. That existing English case law could be prayed in aid.

Quite simply, the Scottish Churches Committee feels that the test is too radical and swift a move. It has been said that it is a charter for lawyers—as I am a lawyer, I can say that. Charities will spend a lot of money on trying to get legal advice and help. If they do not make it with OSCR, will they then have to spend a lot of money on appeals? They will not get that money back, and they might have

to go all the way to the Court of Session. If we go forward on this basis, the charities sector will have a worrying time.

My other great concern is what might happen if the Westminster definition and the Scottish definition differ radically, which is an issue that other witnesses have mentioned. For example, a number of religious organisations, including the Methodist Church of Great Britain and the United Reformed Church, operate cross border. It would be a ludicrous situation if those churches were defined as a charity in England but not in Scotland.

I fear that we could also get into a situation in which the Inland Revenue feels unable to withhold tax benefits from Methodist congregations in Scotland because congregations in England are in receipt of those benefits. We could see former charities being in receipt of tax benefits but not being monitored or regulated in any way, even in respect of their accounting and other procedures. I am as fervent an upholder of Scots law as anyone is, but we have to be pragmatic. Total confusion will be caused in the long term if we proceed on this basis.

Vanessa Taylor: The Scottish Inter Faith Council’s view is that the guidance on the public benefit criteria is not clear. We welcome the criteria’s inclusion in the bill because, in their absence, we would be even less clear about how to meet the test. Although having guidance is a positive step forward, it is not clear and, as a result, much confusion, uncertainty and concern will be caused about whether certain religious organisations meet the criteria.

I echo Janette Wilson’s concern that, if the public benefit criteria were different to those that will be applied down south, an anomalous situation could be created whereby a body might not be given charitable status in Scotland but would qualify for tax benefits.

Ivan Middleton: It would be helpful at least if some public benefit criteria were made clear. Somebody will have to do that at some time, and it would be best if it were done at the beginning of the process rather than later.

It would be possible still to have an open test, whereby people could say, “Even though we do not meet those criteria, we meet the test on other criteria.” There should be something in the bill for starters, so that people at least know where the debate begins.

12:15

Donald Gorrie: Could there be a problem for organisations such as the Humanist Society of Scotland—I do not know whether it would be

regarded as a religious body—in respect of whether it provides public benefit and helps to improve the moral conduct of the citizenry? Have you given thought to how you would demonstrate public benefit?

Ivan Middleton: Yes, indeed. I draw attention to the 2001 census in Scotland, which showed that 28 per cent of the population—I think that it was 27.9 per cent, to be accurate—said that they had no religious belief. However, they still want to have rites of passage, and they turn to humanists for that. We did more than 1,000 funerals in 2003, and I would imagine that the figure for 2004 will have exceeded that. We also do humanist weddings, naming ceremonies and gay affirmations. There is a public benefit there, at least for the 28 per cent of the population who can turn to us for those services.

I was involved in the national working party that revised the guidelines on chaplaincy, which were brought into effect a couple of years ago. In fact, I am a humanist chaplain, attached to Lothian hospitals. They took the 21st century approach that people want to have reference to people whose set of beliefs they are comfortable with.

We would like the reference in the bill to “the advancement of religion” to have “or belief” added to it. The fact that human rights legislation consistently uses phrases such as “religion or belief” is an argument for that. We think that that would make the position a lot clearer.

The Convener: Before we move on to the next question, I apologise to the witnesses: I appreciate that you are probably having some difficulty with the sunshine behind us. It just goes to prove that we have four seasons in one day in Scotland—that is not an urban myth. The clerks have requested that the blinds be lowered—unfortunately, we are not able to do that manually. I am sorry for any inconvenience that the sun might be causing you.

Janette Wilson: As long as it is not making us look too shifty.

The Convener: Not at all.

Linda Fabiani: It is giving you a halo.

Patrick Harvie: I ask the panel to expand on the question of the public benefit test. One of the difficulties that I had when I was going through the papers last night—unlike Mary Scanlon, I was going through them quite atheistically—

Mary Scanlon: Did you know about my religious beliefs, Patrick?

Patrick Harvie: Similar arguments are put forward by the independent schools and the religious organisations and I experienced the same problems with both. Some of the arguments

about schools were discussed earlier in the meeting. The case that is effectively being put by both kinds of organisation is that they provide a public benefit, but do not want to be tested against it. They are convinced that what they are doing is of public benefit, but they are unwilling to be, or are uncomfortable about, being exposed to the public benefit test in the same way as every other charity, despite the fact that the benefits of charitable status are identical. Could you expand on the question whether you provide a public benefit and, if you do, why you feel some difficulty in demonstrating that?

Janette Wilson: Part of the Scottish Churches Committee’s concern is what removal of the presumption of public benefit will mean. As I think I have explained, I believe that that is a rebuttable presumption. Indeed, there have been cases where it has been determined that certain religious organisations are not of public benefit.

I do not believe that any member of the Scottish Churches Committee feels threatened by having to establish that they provide public benefit. They all truly believe that they provide lots of public benefit; the issue is how that is to be measured. Having considered the criteria, as some of the independent schools have said, we are still a wee bit in the dark as to how the system would operate. It was the strong view of the committee that the criteria could be broadened. The example that we gave was that we would particularly welcome the possibility being made clear of

“public benefit being non material – for example spiritual or moral benefit.”

The Scottish Executive flagged that up in the original consultation paper, but it is not in the bill.

Churches consider that they provide considerable public benefit and they would feel happy about being tested on it, but they would like to be sure that the test would be reasonable. They are also worried that it will be difficult to judge against the test and that OSCR, which will have a lot of work to do anyway, will have to go right through the charity register and evaluate every charity. How much time will it spend on each of the 35,000 charities? Clearly mistakes might be made, which would be costly to charities to put right. There is an air of uncertainty, which is why we prefer the English approach, which sets a precedent for the kind of test that would be applied and the approach that would be taken.

Patrick Harvie: Do other panel members have a comment on that?

Vanessa Taylor: Yes. Members of the Scottish Inter Faith Council were clear that they provide a public benefit. There was a split in opinion; some people were not particularly concerned about meeting the public benefit criteria, but others were.

That relates to the fact that the public benefit criteria are not clear and we did not feel that the guidelines clarified them. Our members are not worried that they cannot withstand the public benefit test, but they do not know what the criteria are. It would be helpful if there were a way to allay people's fears. One way to do that would be to include the statement that public benefit might be non-material and include spiritual or moral benefit. That would go some way towards allaying people's fears about meeting the public benefit criteria and about the removal of the presumption of public benefit.

Patrick Harvie: Would there not then be a danger of our getting into tortuous arguments about what constitutes moral benefit and who defines it?

Vanessa Taylor: I am not a lawyer, so I do not know how tortuous that would be.

Patrick Harvie: I am not a philosopher, but I think it would get complicated.

Vanessa Taylor: The guidelines for the criteria do not make it clear that non-material benefit would be taken into account, or that if it were taken into account it would encompass spiritual or moral benefit. Perhaps that is not the correct way to word it, but we would certainly welcome if the lawyers could come up with something—if it were not too tortuous—that would reassure people that spiritual and moral benefit could be taken into account.

Patrick Harvie: Does the Humanist Society of Scotland have views on the question?

Ivan Middleton: Yes. I have already addressed some of those points with Donald Gorrie. We try positively to encourage people to lead moral and ethical lives and we share in that with our colleagues who bring in a supernatural dimension, which we try to manage without. We are all trying to promote a more moral and ethical stance in public and private life.

I was talking to colleagues before the meeting and there was a feeling that we were negative and against religion, but the society is about much more than that; we are positive about people trying to make the best of this life as we feel that it is the only one that they are likely to have and it is the only one for which there is evidence.

To address your question, every charity has to prove that it provides public benefit, so we cannot really proceed without the test.

Christine Grahame: This is quite tough stuff. Mr Middleton introduced an interesting idea about section 7(2)(c) and whether the words "or belief" should be added at the end of "the advancement of religion". That is a difficult idea, but you might have stumbled on something when you talked about moral and ethical purposes.

There is no definition of religion in the bill; mercifully, perhaps. However, there is a definition of designated religious charities. There is also a definition of designated religious bodies under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. Janette Wilson's submission says that section 64 of the bill is

"an amended form of 'designated religious body' status"

as introduced by the 1990 act. In what way has the status been amended? Does it matter that there are two definitions?

Janette Wilson: As I understand it, designated religious body status will cease when the legislation comes into effect.

Christine Grahame: The bill, when enacted, will repeal that legislation.

Janette Wilson: It is certainly the case that because of the clean-sheet approach, those bodies that were designated religious bodies will have to apply to be designated again and will therefore have to be given the once-over by OSCR against the criteria set out in the bill for being a designated religious charity. Apart from some tiny differences in the wording, those criteria are the same as in the 1990 act. However, the Scottish Churches Committee prefers the 1990 term "designated religious body" because it is the body, such as the Church of Scotland, that is designated. The component elements or congregations that we are talking about are also charities of course. When the term "designated religious charities" came out, people started to get confused and I had a number of congregations that do not have 3,000 members wondering whether there was going to be some change.

The designated religious charity will be the denomination, if I can put it that way, and the component elements are all the bits and pieces. Churches are made up of a number of different legal animals. Obviously the Church of Scotland is the one that I am familiar with and it is particularly complicated because it is a series of courts of the land—kirk session, presbytery and General Assembly—and there are a number of voluntary associations in there. There are the central boards and committees of the General Assembly and over and above that there are statutory corporations set up by act of Parliament. Those are all parts of the component and structural elements of the church. Above all that, there are a number of trust funds and different organisations that have been set up as separate charities.

We might not start again from where we are now, but whether those individual bits of the organisation became charities was sometimes just a matter of luck. Some trust funds or bequests were left and, for reasons best known to itself, the Inland Revenue issued them with separate charity

numbers. In other cases, the funds or bequests just formed part of the congregation's own charity number. There are many different charities contained within the ambit of what will be a designated religious charity.

Christine Grahame: So the Church of Scotland will have many charitable functions and each of those will be required individually to—

Janette Wilson: No. Each congregation is a separate charity with its own charity number. There are also regional and central bodies which have separate charity numbers.

Christine Grahame: I see.

Janette Wilson: The idea of designated religious body status—and probably designated charity status—is a kind of compromise that was invented in 1990 to try and get around the situation in the Church of Scotland.

Christine Grahame: It was to try and get around the multiple things that are done in the Church of Scotland; I understand.

Janette Wilson: I have tried to put the other side of the equation in my paper. Designation can be justified on the ground that a body can prove that it can self-regulate, that it can control all its bits and pieces and make sure that they are all behaving themselves. If the body then falls down, it should lose the status and that would open it up to the full battery of regulatory controls.

Christine Grahame: Mr Middleton, does that also apply to your organisation? Would it be a designated religious charity?

Ivan Middleton: No; not if the word “religious” is there.

Christine Grahame: You would need the wording to be amended.

Ivan Middleton: Yes, or we would just be designated as a charity.

Christine Grahame: The organisation would just be a charity, so section 64 would not apply to you.

Ivan Middleton: I realise your party affiliations, but reference has been made to what is happening across the border. Our sister organisation, the British Humanist Association, is also seeking to have the Westminster legislation include “religion or belief”, and it is having some success with that argument.

12:30

Christine Grahame: I was speaking less from party affiliation than as an ex-Scots lawyer about the individuality of Scots law and trying to make it even more individual.

Ivan Middleton: Right. Some people have said that, if there is no definition of religion, what is the definition of belief? That would open up some difficulties. However, the International Humanist and Ethical Union—IHEU—is a non-governmental organisation that has a seat at the United Nations, which suggests that some tests have already been applied to and passed by secular humanism.

Christine Grahame: I do not know whether I want to ask you to guide us by giving me a definition of a religion or a belief that would qualify, and a definition of one that would not, according to the test. I do not think that I want to tread there, unless you want to tell us. I am basing my assumption on past case law. We are saying that there is a clean sheet, but OSCR and others will pay heed to what has been in guidance previously, if not formally.

Janette Wilson: One would hope so.

Ivan Middleton: But as well as looking back, we need to look forwards. Society is becoming much more complex and people are making different choices. We must try to get the legislation to anticipate some of that, as well as to catch up with where we are now.

Mary Scanlon: I want to ask about the phrase “public worship” in section 64(1)(b). That is one of the tests. Can you define what public worship is and how you would be able to pass that test?

Ivan Middleton: I will answer that first, to get it out of the way. We would not pass that test because we do not worship anything.

Mary Scanlon: So, you would not qualify—

Ivan Middleton: We could qualify under other criteria.

Mary Scanlon: What is Janette Wilson's definition of public worship?

Janette Wilson: Some members of the Scottish Churches Committee are not designated religious bodies at the moment, as they cannot meet these criteria. It is important to distinguish between the test for being a charity and the test for being a “designated religious charity” under the bill.

I will give a lawyer's answer to the question of the definition of public worship. That wording appeared in the 1990 act and did not cause the Scottish Charities Office any particular problem. From a Christian perspective, public worship is what happens in churches on Sundays and on other days of the week. To a different extent, it can happen in house groups, and so on.

Vanessa Taylor: It is not something that we have found to be a problem for any of the faith communities. I do not think that there is any off-the-peg definition of worship that everybody agrees with, although I could be wrong about that.

I would guess that worship would generally be seen by religions that have a god as praising that god or gods. For religions that are non-theistic, I would guess that it would be, for example, veneration of the Buddha by Buddhists. I do not know about the legal status of public worship but, as far as I am aware, it would not be a problem for any of the other faith communities.

Donald Gorrie: My question follows on from what has been said. I am not a church expert, but I understand that some churches have a much more decentralised structure and cannot therefore say, "We are a church with 3,000 members." Might there be a problem for those people to qualify under the designation of being one organisation with 3,000 members, whether they are Christian or whatever? I am not sure how organised the other faiths in the country are.

Vanessa Taylor: As far as we can see, the "designated religious charity" status relates mainly to accounting provisions. There are no faith communities in Scotland, outside the Christian faith, that would currently qualify. They would meet the first three criteria, but none of the other faith communities in Scotland at the moment would meet the criterion of having a centralised internal structure. However, given that that is not about the designation of a religious body, but about accounting provisions, it is not of particular concern to our membership.

Ivan Middleton: I am not terribly comfortable with the designation. It feels like one law for the rich and another law for the poor. How often have we heard about self-regulation over the past few years? It has not always worked. I would have thought that there should be one piece of legislation that applied to all charities.

Janette Wilson: I appreciate that point of view, and I have tried to address that in my written submission. One could take the view that if it ain't broke, don't fix it. The law has been in effect since the 1990s, and I am not aware that there have been complaints or that the Scottish Charities Office had any particular concerns about the mechanisms of self-regulation that are in place. If there were concerns, the status could be removed and that would open up the charitable body to full regulatory control.

One of the members of our committee, the Baptist Union of Scotland, whose congregations are largely independent and are not supervised to any extent by the centre, was not able to qualify under the 1990 legislation and appreciates that it will not qualify under the bill. I am sure that it would like to qualify, but if the reason for giving this status is partly the fact that the churches can show that they have these provisions in place, perhaps it is difficult to justify it for those religious denominations that do not.

Patrick Harvie: I have tried to ask several witnesses about this, including the bill team. Designation as a religious charity seems not only to offer self-regulation, but places some constraints on investigations when there is a suspected problem. If a regulator does not have access to the information, how do they know whether there is a situation in which they need to intervene? It also seems insufficient to say that designation can be withdrawn, as that is simply an additional hoop that the regulator would have to go through—an additional test that would have to be met in order to regulate effectively.

Can members of the panel explain to me why, of all the 13 purposes or any other purposes of charitable status, it is religion rather than science or the relief of poverty that qualifies for such status?

Janette Wilson: From my reading of the legislation—and this reflects the 1990 act—I would say that there are no constraints on the regulator in carrying out inquiries on a designated religious body. The provisions are just the same as for other charities, as far as investigation and making inquiries are concerned. Your question relates to the list of charitable purposes. I do not think that I could put it better than it was put in "Private Action, Public Benefit", which was the review of charities that was produced by the Cabinet Office. That document says:

"The retention of advancement of religion as a category of charity underlines the fact that religious faith and worship continue to have a significant role to play in society. Religion also motivates giving to other charitable causes and many religious organisations contribute significantly in a wide range of pastoral activities in the community. And many of the largest and best-known charities have a religious origin."

That encapsulates for me the reason why the advancement of religion should be retained as a charitable purpose.

Patrick Harvie: I am not proposing to withdraw it as a charitable purpose; I am asking why it, rather than other charitable purposes, of which we could find advocates, qualifies for special status.

Janette Wilson: The advancement of science is also going to be one of the charitable purposes.

Patrick Harvie: But there are no designated scientific charities.

Janette Wilson: I am sorry. You are asking about designated religious charities.

Patrick Harvie: And their exemption from rules on governance that apply to the rest of the charity field.

Janette Wilson: I understand why you approach the issue from that point of view. However, as I say, the 1990 act was probably a

compromise on how to square the circle regarding the position of the Church of Scotland's constitution, but still produce something that was fair to other religious bodies. The Church of Scotland would not want to have special privileges that other religious bodies did not have. Such privileges could be justified because they would be given only to those religious organisations that could show that they had adequate supervisory and disciplinary systems and structures in place.

Patrick Harvie: I understand the case that you make but it seems to me that many large and well-established charities would be able to show that they had procedures to ensure that disciplinary matters were dealt with properly and to ensure accountability and transparency. Indeed, I would think it inappropriate for charities over a certain size not to have such procedures. However, we do not then say that they should be exempt from regulations. They receive the benefits of charitable status; surely they should come under the same regulations as others.

Janette Wilson: Perhaps you will receive submissions from other bodies to suggest that they would like to have a provision such as this one. I note that a provision has been included for registered social landlords which, in effect, takes them out of the bill. I presume that that has been done because they are considered to be able to self-regulate.

There is concern about the burden of over-regulation. Adding another layer of regulation to some charitable bodies—depending on the area in which they operate—may be unduly burdensome. Those issues may have to be addressed depending on how OSCR performs and on how its regulatory role is perceived by the charitable sector.

Patrick Harvie: Do other panel members have views on this issue?

Vanessa Taylor: My understanding is that this is less about a special privileged status and more about avoiding a duplication of effort. Just because the status has been in place for a long time is not an argument in itself, but the status has indeed been in place for a long time and there have not been any problems with it. The issue is less about lower thresholds for designated religious charities and more about the format. Certain accounting standards will still be required, and people are obviously satisfied that the designated religious charities will meet those standards. It is simply a case of accounts being in a different format.

My understanding of the bill is that it is hoped to avoid over-regulation with OSCR and also to avoid placing a huge burden on OSCR. I have heard it said that OSCR should not offer general advice to

the charity sector because that is already done by umbrella bodies in the sector. For OSCR to offer such advice would be a duplication of effort. If OSCR had to regulate each individual place of worship, it would be a huge burden, and even more of a duplication of effort, when it has already been proven that those places are meeting accepted standards of accounting.

Patrick Harvie: Proven to their own satisfaction.

Ivan Middleton: Your question is really to do with charitable purposes and the advancement of religion. As I have suggested, if “or belief” is added, you bring in 28 per cent of the population that are otherwise excluded. I would see that as being the advancement of morality and ethical behaviour. There would be more credibility if “or belief” were added.

Janette Wilson: It is my understanding that the Humanist Society already has charitable status.

Ivan Middleton: Yes, it does.

Janette Wilson: What is being suggested is perhaps simply a recasting of the list, rather than anything more radical.

12:45

Ivan Middleton: When one reads the list from a humanist perspective and sees “advancement of religion”, one has to pause and think about that. On balance, that probably should be there. If we include belief in that context of morality and ethical behaviour, then I think that it should stay.

The Convener: I understand that Linda Fabiani has some outstanding issues relating to spiritual and moral benefit. As we have discussed that at some length, I ask you to restrict your question—

Linda Fabiani: Yes, I will be quick: this is for my own benefit—not my spiritual or moral benefit, I hasten to add, but for clarification. We spoke about the subject earlier and I understand Vanessa Taylor's comments about lawyers making definitions, but that is hard to do in this area. In a sense, there is an issue around changing from “spiritual or moral” to “ethical or moral”, but how do we define or measure those things? Who should define or measure them? Is it feasible to define or measure subjective things in legislation?

Janette Wilson: The worry of the Scottish Churches Committee was that, if there was no reference to such criteria in the bill, there would be no signal to OSCR to take them into account. Speaking as a lawyer, I find this matter very difficult. How much do we put into the bill and how much do we leave out? That brings me back to our committee's view that it is too radical to start completely from a clean sheet. We need some help with this.

It is fair enough to say that the definition of charity cannot be put in a straitjacket—it will have to change as time goes on. Many people would now regard some of the bodies that originally had charitable status with horror, saying, “That can’t possibly be a charitable organisation.” Things must change with time, but it is a matter of getting the right balance: how can we leave OSCR to judge those things without any signposts? It would be helpful to OSCR if it could refer to precedents.

Vanessa Taylor: I do not know to what extent I can answer the question. I do not know how feasible it would be to make such definitions and in what sort of language they could be spelled out. As it stands, the bill gives us some concerns, because we would not be confident that spiritual or moral benefit would be taken into account. There would need to be some statement of clarification along those lines. There could also be recourse to case law, which might help to clarify things.

Ivan Middleton: Linda Fabiani asks a very good question. I am reminded of the Social Work (Scotland) Act 1968, which I think contained a section to “promote social welfare”, which was seen as a very laudable intention. That is one of the reasons that I am sitting here, in fact—I came from Northern Ireland to Scotland largely because of that provision in the 1968 act, and I am very glad that I did. If something could be included in the bill to encompass the promotion of social welfare, what would be wrong with that? That is not included in the list.

I would have thought that the draftsmen could come up with something to encompass that. That would lead to a clearer definition, to my mind, leaving aside all the spiritual and supernatural considerations, which I do not think anybody would particularly want to go into, and which could be taken as understood—or not understood, as the case may be.

Linda Fabiani: What I am getting from you all is that the wording “spiritual, moral or ethical” is not in itself precious, and that it signifies more of an intent. Would that be fair?

Vanessa Taylor: Yes.

Janette Wilson: Yes, although I am not terribly keen on the word “supernatural”.

If I may, convener, I will also mention a technical matter that relates to the charity test. I made a supplementary submission to the committee, having had a late thought on the subject of third parties directing or otherwise controlling the activities of a charity. The bill provides that a body will not

“meet the charity test if ... its constitution expressly permits a third party to direct or otherwise control its activities”.

That cuts across the designation of charitable status. A charity may have component elements,

not all of which will have charitable status, and will have to have a system in place to control them. Does that mean that it cannot be a charity? I think that that was not the intention of those who drafted the bill, but it could arise as an unintentional consequence.

I hope that I have made it clear in my supplementary submission that we think it should be okay if the third party is itself a charity. By way of an instant action, I also included the wording of an amendment to section 7(3)(b).

Christine Grahame: No doubt we will come to that.

Janette Wilson: It is on the second page of my supplementary submission. I appreciate that the committee is at stage 1 of its consideration and I am happy to return with the suggestion at stage 2.

The Convener: We are at stage 1, so we are considering only the general principles of the bill. I am sure that your suggestion will prove useful and we may consider it at stage 2.

Cathie Craigie: Chapter 9 deals with charity trustees. I think that we have some sympathy for the points and concerns that the SCC raises in its submission on the subject of the duties of trustees under section 65. Section 68 details the circumstances under which a person would be barred from being a charity trustee. Given that mismanagement is now subsumed under the definition of misconduct in section 103, is it inappropriately harsh to say that someone could be removed from being a trustee if they were guilty of mismanagement?

Janette Wilson: It could be. A lot would depend on the circumstances. The bill introduces a number of duties that charity trustees will have to remember; there are a number of things that they will have to submit if they are to go on to the register. I take the view that an inadvertent breach should not normally, of itself, lead to either suspension or disqualification. That should not happen unless the breach has been persistent or continued despite efforts from OSCR by way of training, coaxing and help, or if it has been of such a nature that severe danger could result to the property or assets of the charity.

Vanessa Taylor: The conflation of mismanagement and misconduct is a serious issue. For lay people like me, the two words have completely different meanings. Whereas mismanagement can be seen as a muddle, misconduct is seen more as a fiddle—it is more sinister and deliberate.

Criminal sanctions are entirely appropriate in cases of misconduct—indeed, they would deter people from misusing a charity for their own ends—but the idea that someone could come

away with a criminal record for simply getting things wrong or making a mistake has serious implications for the sector. If people are not willing to take on the responsibility of becoming a trustee, there could be serious implications for charities in Scotland in general. I agree absolutely that the issue is of concern to us.

Ivan Middleton: The concept that is required is one of competence. Before the establishment of the care commission, an area of work with which I was involved, the people who ran old people's homes or children's homes had to demonstrate against a set of criteria that they were fit persons to do so. People knew what was expected of them and the criteria against which they would fail.

I understand colleagues' concern if the only concept is one of mismanagement and there is no clear definition of what that might mean—for example, incompetence. It would be worth while to explore the avenue of competence testing, possibly by giving OSCR the means of bringing competence tests up to date.

Cathie Craigie: You are opening up a new concept. Although there is training for volunteers in the voluntary sector and charitable organisations, it is not part of the bill.

I want to ask Janette Wilson about the articles of the church, which we started off discussing. The bill will give OSCR the power to come in and remove someone in the kirk session who has repeatedly run off with the collection. If OSCR said that such a person was not fit and proper to be a trustee, would not that fall in with the general rules of the church? Would not the church take action against someone in that context?

Janette Wilson: Absolutely. I am pleased to say that we have very few cases of office-bearers running off with money, but we can never be complacent about such things. However, there is a theoretical aspect to the question. There was, for example, a high-profile case, which I think goes back to the last time the general assembly went into private session a number of years ago, in which there were applications from two individuals who wished to train as ministers in the Church of Scotland. One had a conviction for murder and the other had a conviction for embezzlement, having been a bank manager. Obviously it was necessary to try to test and judge their call and whether they had put their past behind them and were fit and proper persons to train to be ministers. The minister has a key role as he is a charity trustee. If we had to turn round and say to people in such a situation, "You cannot become a minister of word and sacrament because you would not qualify as a charity trustee" we would see that as the state interfering in office holding in the Church of Scotland.

Cathie Craigie: We will probably have further discussions about that. I would welcome further information on this part of the bill. I do not see conflict. The general public want us to ensure that charitable organisations are regulated and that they can trust the people who are involved with using their money for good causes. I do not know that there is such a big gulf between your position and what is proposed in the bill.

Janette Wilson: It was always said that, traditionally, churches raise money from their members; they do not fund-raise from the public. However, society changes and many congregations are going into partnership with other bodies and attracting other charitable funding. Our committee therefore accepts the increased requirements in relation to monitoring that will be put on congregations. Congregations will have the same obligations as other charities to produce their accounts and send them to OSCR along with an annual return and to answer any reasonable questions that OSCR might have about them. That exercise will produce a situation whereby any financial irregularity would immediately come to light, OSCR would intervene and the church body concerned would put its house in order. If it failed to do so, it would lose its designated charity status and would be reduced to the same status as everybody else.

The Scottish Churches Committee has already met the head of regulation control in OSCR. OSCR does not regard churches as a high-risk sector; in a way, it will be pleased that the central bodies of churches will be helping it and doing part of its work. Ploughing through in great detail 1,500 sets of Church of Scotland congregation accounts must be a pretty joyless activity. Knowing that someone else has looked over the accounts and okayed them at a presbytery level will be helpful to OSCR, as will the ability to go to a one-stop shop of people at the centre who can explain what various things mean.

Churches love arcane, useful information. I sometimes look at church accounts, which have to be prepared in accordance with the rules laid down by the General Assembly, which were approved by the Scottish Executive in order that the Church of Scotland and, indeed, the other bodies should get designated religious body status. I think that it will be helpful to OSCR to have a central controlling mechanism to assist it in its task, so that there will be proportionate regulation of church congregations.

13:00

Patrick Harvie: I want to follow up on the issue of disqualification. My question relates to the dual role of an individual being both a trustee of a charity and an employee of it; I have some general

concerns about that. You mentioned the possibility of someone being disqualified because of the designation, although that would be fairly unlikely. Are you saying that it would not be possible for the Church of Scotland to organise its affairs in such a way that someone could be employed as a minister without being a trustee of the charity?

Janette Wilson: That would not be possible. I think that the same would be said for other religious organisations. Ministers of religion and priests play a crucial role in the administration and the running of the charity.

Patrick Harvie: It would not be possible for them to do the ministry but not the administration.

Janette Wilson: There might be those who would like to remove, for example, all ministers from the General Assembly of the Church of Scotland, but it might become a quiet affair. It is simply the way in which church bodies are constituted. I am afraid that they are not the same as other charities in that respect: their structures are very different. That is the way that it has always been. The Church of Scotland would not be very happy if it was suggested that it should totally reorganise its structures to take the bill into account.

Patrick Harvie: Everybody else in society has to.

Mr Home Robertson: We have, understandably, concentrated on the Church of Scotland, on Christian churches and on the humanists. Can we confirm that other faith communities have had an opportunity to make representations to us directly or through the Scottish Inter Faith Council? Have any specific points been raised by the Muslim community, Jewish people or other faith communities?

Vanessa Taylor: In relation to a specific aspect of the bill?

Mr Home Robertson: Are there any general points to do with the bill that we need to be aware of?

Vanessa Taylor: On most points, we would have concerns similar to those that have been expressed by the Scottish Churches Committee. One area in which we would have a specific interest would be the definition of religion. That definition should be as inclusive as possible and should not exclude multideity or non-deity religions. I do not think that anything specific has come up that has not been covered in some way.

Mr Home Robertson: But it is open to anybody else to make representations.

Vanessa Taylor: Yes, absolutely.

The Convener: I thank the witnesses for their attendance, which is much appreciated. We are

also grateful for the written submissions from the Scottish Inter Faith Council and the Scottish Churches Committee in advance of the meeting. I am sure that they gave us all some food for thought last night.

13:04

Meeting continued in private until 13:18.

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