

COMMUNITIES COMMITTEE

Wednesday 26 January 2005

Session 2

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COMMUNITIES COMMITTEE

3rd 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:

Colin Armstrong (Wise Group)

Richard Hellewell (Office of the Scottish Charity Regulator)

Kate Higgins (Capability Scotland)

David Jack (City of Edinburgh Council)

Keith Jackson (Edinburgh Leisure)

Robert Livingston (Highlands and Islands Arts Ltd)

Jane Ryder (Office of the Scottish Charity Regulator)

Dr Eilidh Whiteford (Oxfam in Scotland)

CLERK TO THE COMMITTEE

Steve Farrell

SENIOR ASSISTANT CLERK

Katy Orr

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

Committee Room 1

Scottish Parliament

Communities Committee

Wednesday 26 January 2005

[THE CONVENER *opened the meeting at 09:30*]

Charities and Trustee Investment (Scotland) Bill: Stage 1

The Convener (Karen Whitefield): Good morning and welcome to the third meeting of the Communities Committee in 2005. I remind everyone present that mobile phones should be turned off.

Agenda item 1 is on the Charities and Trustee Investment (Scotland) Bill. We will hear evidence from three panels of witnesses. I welcome the first panel, which is comprised of David Jack, the head of strategic support at the City of Edinburgh Council; Keith Jackson, the chief executive of Edinburgh Leisure; and Robert Livingston, the director of Highlands and Islands Arts Ltd, which is known as Hi-Arts. Before we begin formal questioning, I mention that the Convention of Scottish Local Authorities was also invited to give evidence today, but it advised the committee at somewhat short notice that it was unable to do so. In addition, I understand that Christine Grahame is unable to attend the meeting because she is a little under the weather this morning.

I will ask the first question. Do you believe that the Scottish Executive consulted satisfactorily on the bill's proposals, took on board the responses to the consultation and reflected the suggestions in the bill as introduced?

David Jack (City of Edinburgh Council): Perhaps I could make the first contribution. We were impressed with the original consultation material, which was very well presented. Proposals for legislative change are usually fairly dense, so it was helpful to have easy-to-read material. The council had to do an internal consultation and collect views together, and the base material was certainly useful for that.

On whether the views expressed in the consultation were reflected in the report analysing the responses, I thought that the report was an extremely good production and an excellent summary of all the views that were taken. There was obviously evidence of significant changes in the grain of the totality of the consultation responses.

Our own experience at the council shows that taking consultation to a Rolls-Royce standard requires bespoke responses to individual

consultation replies rather than just a composite, summary reply. However, that would be quite a task when there are hundreds of responses. The step on from the standard that has been achieved in this case might just be such a high standard.

Robert Livingston (Highlands and Islands Arts Ltd): From a Highlands and Islands perspective, I am certainly conscious that bodies such as the Scottish Council for Voluntary Organisations and Voluntary Arts Scotland carried out thorough consultations with their constituencies. I think that their submissions have been listened to and taken on board. However, when working through such umbrella bodies, there is the danger that on-the-ground groups in rural areas such as the Highlands and Islands are not necessarily fully engaged in the consultation. It can be difficult for voluntary sector bodies to carry out such consultation on a Scotland-wide basis. Certainly, from the point of view of our charity, I was aware that the consultation on the bill was going on, but I was not aware that it particularly impinged on the Highlands and Islands. Having said that and having been invited to come here today, I found all the documentation extremely clear. As my colleague said, that did a great deal to advance the process.

Keith Jackson (Edinburgh Leisure): I support my two colleagues' comments. Advance information was very thorough. The only weakness that I would highlight is the late invite to this meeting. We were invited only last week, which did not give our organisation much opportunity, if any, to debate the issue at board level. It is at the latter end that there has been weakness.

The Convener: The main role of the Office of the Scottish Charity Regulator will be one of regulation, but it is being suggested to the committee that it should also have a role in advising on good governance. Do you think that OSCR should have a role in giving advice as well as its main, primary role of regulation?

David Jack: In our original submission, the council's view was that it was difficult to be both an advising body and a regulatory agency. We had identified the potential for SCVO at Scottish level, and perhaps also the local councils for voluntary service, to support advice giving and any other more benign support for voluntary organisations in the charitable area.

Based on our experience in the council, we feel that the only other way to approach the issue would be to have very clear protocols—Chinese walls, if you like—between those giving advice and those monitoring and overseeing the delivery of services. Inside one organisation, that raises questions of where the real divide lies. Our preference would be for appropriate resourcing,

either nationally or locally, of local agencies to provide that support. In many areas, there is a growing atmosphere of partnership between agencies and the voluntary and community sector. Complications arise in the area that we are talking about, as there are differences between advice giving and support and monitoring and evaluation. That is a growing issue and does not affect this bill alone.

Robert Livingston: From what I know of the plans for OSCR, there seem to be a lot of benefits to its remaining a relatively lightweight, small-scale, streamlined organisation with a clear focus. Speaking from the point of view of the cultural sector that we deal with, I know that governance issues can become specific to different sectors and are often best addressed within those sectors, through bodies such as the Scottish Arts Council, local authorities or Voluntary Arts Scotland. As the SCVO submission said, there is a great deal of that kind of help out there. Perhaps it needs more resourcing, but I agree that it should be kept distinct from the regulatory functions of OSCR.

Donald Gorrie (Central Scotland) (LD): Before I ask a question about arm's-length companies, perhaps I should put on record the fact that I was on the City of Edinburgh Council when it set up its arm's-length company. At the time, I was not enthusiastic about that, but a lot has happened since then, so I have an open view on the matter.

What are the benefits of having some activities that used to be council activities done by an arm's-length company? What are the benefits to the council, to the arm's-length company and to the public, who are supposed to be the main beneficiaries?

David Jack: Perhaps I can offer a word or two on that, but I am sure that Keith Jackson is better able to describe the operational benefits. As far as the council is concerned, the history of the creation of arm's-length companies such as Edinburgh Leisure is that it was originally driven by financial questions and by the search for savings in service delivery. Those companies are much more mature now and, for example, the independent status of Edinburgh Leisure provides a guarantee of affordable sporting and leisure activities for the whole of the city, with all sorts of prospects for engagement with communities made easier in a linkage with a separate organisation. A single structure has been achieved for managing the city's sports and leisure infrastructure that has operational freedom to get on with that job without suffering from the fetters of the local government machine. Because there are more interests and input at board level and management level, the quality of service is improved.

On the financial front, the trust vehicle allows for the capturing of external resources from other

funds, which substantially boosts the funding available for service development. Those are the main points. Since the trust was set up, other benefits have been discovered and the service pattern has improved as a result.

Keith Jackson: My first point is that Edinburgh Leisure is not an arm's-length company of the council but a principal in its own right. That is an important differentiation.

There is no doubt that the financial gains to the service have been quite significant. The main benefits that have accrued since the company was established in 1998 are predominantly cultural in nature. There is no doubt in my mind that the service lends itself to operating outwith a local authority bureaucracy. The benefits of being a not-for-profit organisation have been substantial and the way in which the organisation is viewed by many of its partners has a quite significant impact. The views of those partners are important because they determine how they work with us. How they view the status of a local authority versus that of an organisation that is independent from that local authority is also important.

On immediate benefits, there is a risk of doing too much number crunching, but the financial benefit comes in the form of tax benefits. Since the company was established, it has saved somewhere in the region of £1.6 million per year in operating costs. That is a substantial saving over an eight-year period at a time when local authority budgets are under real pressure. Services such as culture and leisure tend to suffer in such an environment.

We should not ignore the impact of bringing an independent board into that environment. Edinburgh Leisure has a board of 13 and its size is about to increase to 15. The local authority has about 30 per cent representation on the board. There have been enormous benefits to bringing in people with different skills and, if you like, a selfish interest in the services that we are trying to provide. At any one time, Edinburgh Leisure has eight to 10 people aboard who focus solely on the delivery of the service that the company was set up to deliver. They have brought new skills and challenges to people such as me and other senior members of staff who are trying to move the organisation forward.

Robert Livingston: We are in an interesting situation because we relate to Highlands and Islands Enterprise in a way that is similar to the way in which Edinburgh Leisure relates to the City of Edinburgh Council. Hi-Arts was established by HIE and we receive an annual contract from it.

I echo everything that has been said about the benefits of that degree of independence, and particularly the points that were made about the

ability to bring in interests and influences from outside the organisation and to secure funding. The amount of money that HIE gives Hi-Arts each year is less than a quarter of its total turnover, all of which is applied for the benefit of communities and the cultural sector in the Highlands and Islands.

As it stands, the bill enhances the concept of independence as an absolute good without necessarily reflecting on the similar benefits that can accrue from partnership. There are already strong checks in place. Through an intervention from, I believe, the National Audit Office, we had to lose a member of HIE from our board; they were required to stand down under new regulations. That meant that our organisation lost a valuable link that benefited both organisations.

Donald Gorrie: One of my colleagues will be pursuing the problems that your organisations would face if they lost charitable status. However, before we come on to that, can you say how many of the benefits that you have described are due to the independence of the organisation and how many are due to its charitable status?

Keith Jackson: Charitable status means that we get relief on the tax on the buildings, which is quite significant. I am not sure what the amount is because the money accrues to the city and not to Edinburgh Leisure. At the time of transfer, it was in the region of £1 million. I suspect that it is probably double that by now. I mentioned earlier that the savings achieved by our decision-making autonomy in operations delivered is in the region of £1.6 million per year.

Donald Gorrie: Those savings are due to the independence of the organisation rather than its charitable status.

Keith Jackson: Yes.

Donald Gorrie: Thank you.

Robert Livingston: In our case, it is difficult to divide the two, but I can give you a concrete example. We recently completed a project called ArtsPlay, which links the child care sector and the arts. ArtsPlay was a £300,000 project and the bulk of the project's funding came from the Community Fund and the Esmée Fairburn Foundation. We had to be independent to access the money and we had to be a charity; the two were very much tied together. If we had not had charitable status, we could not have conceived of the project. ArtsPlay was delivered in partnership with local authority-based child care partnerships across the Highlands and Islands.

09:45

Scott Barrie (Dunfermline West) (Lab): I want to continue to develop the idea of independence—

the theme that Donald Gorrie introduced—but bring the discussion back to what the bill says.

Last week, we heard evidence from representatives of non-departmental public bodies who expressed concerns that they would fail the charity test because their boards are subject to ministerial direction. The independence about which you have spoken today is not quite the same thing, as the number of council appointees does not make up a majority of your board members. Are you concerned that you may be in danger of failing to satisfy that part of the charity test? What would be the effect of the loss of your charitable status?

Keith Jackson: Originally, when we read the bill, we saw no danger of losing our charitable status in that way. The impact of losing our charitable status would be significant for the local authorities that are the direct beneficiaries of the savings in tax. The impact on them would, in turn, have an impact on organisations such as Edinburgh Leisure.

The way in which other bodies view us is interesting. There has been a significant change in people's attitudes towards us as an organisation. People perceive us as being a not-for-profit organisation and a charity. It is difficult to say whether additional funds have come into our organisation because we are a charity as opposed to a not-for-profit organisation—it is possible to be the one without being the other.

Since we became a charitable body, it has been interesting to note a definite softening towards us and an increased willingness to work with us, particularly at the community level of our work. If the situation were to be reversed, it is difficult to ascertain what the position would be, as the effects would take some years to work through the system. The question is difficult to answer.

David Jack: Perhaps I could volunteer a slightly different perspective on the issue that I hope is helpful to the committee. Clearly, there is a tension between the independence of funded bodies and the requirements that councils and other public authorities have nowadays for the proper stewardship of public funds. A lot of the council's grant aid—something like £20 million each year, including the Edinburgh Leisure trust funding of £7 million—goes out to funded bodies. In most cases, we require much more intense and clear service-level agreements, funding criteria and levels of monitoring and oversight. Lately, that has allowed the council to report in the public domain on the efficacy of our grant-aided programmes. For example, we are now able to say how many people benefit from them and what the character of the benefit is in terms of increased volunteering and improved services to tackle social disadvantage. Although the relationship has

intensified, particularly in relation to audit, scrutiny and the need to deliver best value, that does not mean that there has been a direct impact on the independence of funded bodies. It is really important that those bodies are perceived to have a stand-alone position. As others have said, they have to pursue funds in other ways.

There is a tension between the funder's—in my case, the council's—requirement for increased oversight and the independence of the bodies themselves, particularly when the funding is absolutely central to a charitable body's activities.

Robert Livingston: If I may, convener, I will add a point about the NDPBs. I fear that there is a risk of things getting out of step if a decision is taken on the status of the national collection-based bodies before the Cultural Commission reports. A number of national cultural bodies are not NDPBs at present—I am thinking of the performing arts companies—and whatever the commission recommends for their status remains in limbo at present. Clearly, any decision that is taken now on the charitable or independent status of the national galleries and museums will have implications for the future of the performing companies.

Scott Barrie: We might be muddying the waters here, but it is important to air this point. Judging from its written submission, which I have seen only this morning, COSLA appears to be arguing that it wants section 7(3)(b) to be deleted. That paragraph says that a body would not meet the charity test if

“its constitution expressly permits a third party to direct or otherwise control its activities”.

Are you saying that you do not think that the situation is quite as clear cut as that, and that you are concerned about falling foul of the regulator with respect to satisfying it that you are a charity.

David Jack: In the note that the City of Edinburgh Council prepared for today, we said that we think that section 7(3)(b) should be deleted for the avoidance of doubt. Our submission also says that, for a number of reasons—not least the clear public benefit, the charitable objectives and the areas of direction and governance in the case of Edinburgh Leisure—there is not a problem with the test. However, there seems to be some doubt, given the fact that there is now more scrutiny between public funders and charitable bodies. That is an issue.

Mr John Home Robertson (East Lothian) (Lab): I declare an interest as a trustee of the East Lothian Community Development Trust. There may be others who have the same problem.

Mr Jackson said in his initial reply to Scott Barrie's question that he was satisfied that Edinburgh Leisure would not fall foul of the new

provision. I understand from your written evidence that Edinburgh Leisure's board has 15 members, of which just five are councillors. That is a small minority of the trust. What has changed since your first reading of the bill to give rise to your concern?

Keith Jackson: There are two issues there. First, we have no written submission; the submission to which you refer is from the City of Edinburgh Council.

Mr Home Robertson: Sorry—I beg your pardon.

Keith Jackson: The second issue goes back to some of Mr Barrie's comments. On the question of control of our organisation by the city council, that is not the case through the membership of the board. Councillors are in a minority of five among 13. From tomorrow, I hope and believe that that will become five among 15. That is on a par with many other organisations that the city council funds: councillor membership of the board is around 30 to 33 per cent. The control comes through the funding environment, as with any contract. We are geared to delivering the council's policies. Should we fall foul of that, the local authority, through the funding mechanism, has the opportunity to pull the organisation in and address not so much how it is operating, but the direction that it is choosing to take. The funding mechanism is the controlling factor in that, not the membership of the board.

Mary Scanlon (Highlands and Islands) (Con): In paragraph 25 of the policy memorandum, independence is listed as one of the key principles for charities. Given what you have just said, do you feel that you could pass that key test of independence?

Keith Jackson: When we were established in 1998, the Inland Revenue wanted us to pass several key tests, and the process was quite long-winded. The Inland Revenue posed some quite detailed questions, central to which was, “Who makes the decisions on charges?” Charging policy is quite important, given the nature of our services. There were many other tests, and I cannot remember what they all were, but from an independence perspective I have no doubt that the city council does not try, through the funding mechanism, to control or overly influence—or influence at all—how Edinburgh Leisure operates. The council defines the purposes of its grant aid. It provides very broad parameters, for example in relation to the social inclusion agenda, young people, health and sports and recreation. The council will ask the company to tell it how it will deliver services in those areas. That involves a business planning process.

Mary Scanlon: You mention social inclusion, which is a key Scottish Executive objective. If that

were to change in some way, then what you are delivering would change. You are, therefore, following the policies of the Scottish Executive. If you should change direction at some time, would you not find it difficult to meet the key criterion that has been set down by OSCR and prove to OSCR that you are independent? For example, if there were a change of Government, there would be a key change in policy objectives. Would you be able to prove that you were independent?

Keith Jackson: I am sorry, but I am not really sure what your question is. I would have to look at the criteria for independence before I could say whether we would meet them.

Robert Livingston: If there were concern over that particular memorandum, I trust that there would be concern over every charity that receives public funding for a specific set of activities. That is why I say that putting forward independence as an absolute good perhaps does not take account of the natural funding regime within which those who receive public money from any source must operate. The funding regime has, understandably, become increasingly regulatory. It has also become increasingly contractual, for very good reasons. The advantage of a contractual relationship is that it is a two-way relationship that allows the charity to be in negotiation with its funder about the services that it provides and to have the opportunity to refuse to undertake certain activities. That is more difficult when grant aid is simply handed down with a set of conditions attached.

Keith Jackson: It must be borne in mind that, when we undertake our forward planning for three to five years, a clear direction is given to our organisation through a wide range of the council's policies—not just its sports strategies, but its broad social inclusion strategies. We also take note of strategies such as sport 21, which is run by sportscotland, which is an agency of the Scottish Executive. There is a range of strategies and policies that influence the policy of our organisation in developing our strategy. Within the broadest sense, there would be something wrong if the council's policies were not a key driver; however, there are other policies of which we take cognisance, which do not always go in the direction in which the council would wish to go but which may be in the interests of the organisation as a whole.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): It could be argued that Edinburgh Leisure and Highlands and Islands Arts are delivering services that the local authorities should deliver for the residents of their local authority areas and beyond. Some people might say that that undermines the charity brand. How would you respond to that comment?

Robert Livingston: There is a simple answer, in our case. By operating with Highlands and Islands Enterprise, we operate across six and a bit local authority areas and we are able to undertake activities that it would be extremely difficult for those local authorities to undertake either individually or in tandem. Also, we are—as Keith Jackson suggests—guided by many things other than the priorities of any single local authority or of Highlands and Islands Enterprise. We look at wider issues such as the development of the creative industries. That may not be a priority for any local authority in our area, but it is clearly of interest to the Executive, to HIE and to the Scottish Arts Council. It is difficult for any one statutory body to deliver that multiplicity of aims and objectives, but it is much easier with the flexibility of a degree of independence.

David Jack: I can add another point, which perhaps runs away in a direction in which the committee would not want to go. The question was about what it is appropriate for a local council to deliver and what might be delivered in other ways. I do not think that, nowadays, there is the same preoccupation with who delivers a service, not least because of the community planning framework in which we are all working. Joined-up service provision and a sensitive and responsive service profile in communities is what really matters. For example, increasingly, the council and the health authority will work together—perhaps alongside Edinburgh Leisure—to deliver a health improvement programme in communities. It is about ensuring that the pattern of services matches the local need within an overall policy framework, and the distinctions between what local government delivers and what other agencies deliver is more in the background. The notion is that we should have a more coherent service at the point where it is received.

10:00

Keith Jackson: I think that I mentioned in my introductory remarks that, since Edinburgh Leisure was established, we have been involved in a significant amount of partnership work with other agencies. I have no doubt that an important part of that process has been our promotion of ourselves—I think that I used the word “branding” earlier—as a not-for-profit organisation with charitable status. In particular, our work with social inclusion partnerships, including youth SIPs, and NHS Lothian has been significant. It is interesting that even as recently as two or three years ago NHS Lothian did not understand our relationship with the City of Edinburgh Council and our status as a not-for-profit organisation. We have spent a considerable amount of time talking to NHS Lothian about our purpose and how we were established, which is what many of the

committee's questions have been about. That has been a positive process for us and has helped significantly in improving how we are viewed.

I endorse what David Jack said about the general public. All the surveys that we have done—this is perhaps sensitive for some members—demonstrate clearly that the public is not particularly concerned about who provides the service. However, the surveys show that the public is concerned that the organisation that provides their leisure services is not for profit. The surveys were done for us by System 3, as it was then, TNS as it is now, which is a reputable company; they show that the public is very keen on the not-for-profit model and would have difficulties using a commercial leisure service. Members will know that that option is now available to people in some areas. However, people consciously make a choice in our favour, partly because of the nature of our business.

An anecdotal example of the public's attitude is mentioned in the City of Edinburgh Council's written submission. Edinburgh Leisure, not the council, decided to give free swimming to children about 18 months ago. We funded that through increasing charges to the general public—those who could pay. We spent a lot of time marketing that principle, saying, "We are going to increase quite substantially the costs of your swimming. However, we are going to redirect your income into subsidising free swimming for young children." The fact that we are a not-for-profit charity helped that process. We had virtually zero negative responses to the increase, although it was significant. Branding, and how we sell ourselves as a charitable organisation, are important. My opinion is that if the local authority had tried the same process it would not have had the same response.

Linda Fabiani (Central Scotland) (SNP): I want to move away from the added value that you all obviously believe was produced by the creation of the arm's length, not-for-profit company and start considering costs. The Executive believes that it has managed to work out the potential loss to NDPBs should they not attain charitable status. I suspect that many of those bodies disagree with the amount that the Executive has come up with. This question is for Mr Jack. Can you quantify the potential loss to your local authority, in cost rather than value terms, should your hands-off charitable bodies be unable to meet the charity test?

David Jack: We have touched on some of these dimensions already, but I will give an example from Edinburgh Leisure's figures. As far as I know, the rate relief that is available to Edinburgh Leisure in its current operating mode is something like £1.118 million. Edinburgh Leisure operates the council's leisure facilities, although the council

owns them. The comparable figure for the theatre trust is something like £165,000. Those rate charges would be back with the council as extra costs if we operated those services. That does not take into account the scope for attracting income that the charitable bodies have. The council would not have the same scope to bring in such extra income to add to service provision. That is the best example that I can give with regard to the position of Edinburgh Leisure.

Linda Fabiani: You are going to have to broaden that out a wee bit for me. With the council as the body that collects the rates and with Edinburgh Leisure and the Edinburgh Festival Theatre not paying rates, in my head it would seem cost neutral if they were not there. Can you explain why that would be a loss?

Keith Jackson: The business rate goes into a central pot, which is redistributed.

Linda Fabiani: How does that apply to the charities? At the moment, is the council compensated by the Executive for any rates that it does not collect? I do not know the answer to that question. Are councils currently compensated by Government for the fact that charities do not pay commercial rates?

David Jack: I do not think so, but I would have to check. I am not briefed on the nuances of the ratings system to help the committee on that today. I would have to come back with that information.

Linda Fabiani: I would appreciate it if you could do that. Thank you.

Mary Scanlon: In the financial memorandum to the bill, it is estimated that local authorities process around 100 applications for public benevolent collections per annum and that the cost of processing those applications is around £500 a year. Do you think that those figures are accurate?

David Jack: I anticipated that question. With the information that I have been able to bring to the table today, I can give you a feel for the situation. In a city such as Edinburgh, the collections figure for the year lies between 250 and 300, and we would expect that to increase if more of the fundraising activities identified in the bill required licences. We would be talking about a substantial figure, probably in excess of 300 rather than the 100 figure that you have in the financial memorandum.

The licensing process involves the administration of an application, the obtaining of a report and a view from the police, the issuing of a licence and then the recording of returns obtained from collection agencies, which provide us with the figures raised after the event. Although that is all

inside the general licensing function of the council—and there are 80 or 90 different types of licences that are processed by councils—I do not think that the modest administration figure that you quoted is realistic. We do not have figures ourselves for the individual costs of licensing the collections, but it must be more than the figure for which you have an estimate.

Mary Scanlon: I would like to ask two questions. First, the financial memorandum also says that you take 20 minutes to deal with each application. Do you think that that time is accurate? Secondly, do you think that £500, on a pro rata basis, would be an accurate figure for 100 applications? Are you simply saying that trebling that figure would cover your costs for 300 applications, or do you think that the timing is wrong and that, on a pro rata scale, the finances are wrong?

David Jack: I would have to spend more time with my colleagues drawing some of that information out, and we could do that if the committee sought those figures. Patently, even receiving an application, sending it to the police, getting a report back from the police and processing a licence takes more than 20 minutes. The notion of its costing a fiver a throw really is not realistic. It costs £20 or £30 to issue a letter, does it not? We are talking about a substantially larger figure than that for licence management.

Mary Scanlon: Convener, could we ask Mr Jack to let us have that information in writing? I think that it would be helpful.

David Jack: We shall do our best to assemble those figures for the committee.

Mary Scanlon: Are you assured that the bill will help you to manage the applications system more effectively, through OSCR's advice and the proposal for a more consistent national regime?

David Jack: The point about national consistency is helpful. There is no question there. As to the licensing arrangements, I do not know that OSCR's advice in that area will add greatly to a licensing activity that we are quite familiar with.

Mary Scanlon: This question is for City of Edinburgh Council. On boxing day we had the tsunami disaster. Councils are generally closed on public holidays—like others you are entitled to them. In Inverness money was collected in buckets in pubs, clubs, supermarkets and so on, because of the public's enormous compassion and their wish to give to the appeal. Will we be able to respond in such a way to a similar appeal, or will people have to wait days or weeks to apply to collect money? Would that not be a national loss?

David Jack: I am not expert in the particulars of that situation. As far as I know, the licensing

aspect relates largely to official street collections, so informal collections in pubs and workplaces would not be within the ambit of the licensing activity.

Mary Scanlon: So people would still be able to collect in pubs, clubs and supermarkets, but not stand on street corners.

David Jack: That is probably right, but I am afraid that I am not absolutely sure.

Mary Scanlon: My next question is for Hi-Arts. Unfortunately, we did not receive a written submission, but your evidence today has been helpful. You covered most of the points that I wanted to raise when you answered Scott Barrie's question, but I have one final point. You are an independent company limited by guarantee with charitable status. Will Hi-Arts meet the charity test if the representatives of local authorities and other public bodies are only invited observers? If so, could that be a model for other arm's-length charitable bodies?

Robert Livingston: At present, all our directors are independent, so our funders have only observer status, although we encourage them to be active observers and not to sit silently until they are invited to speak, so that we benefit from their input. We work in a range of sectors and geographical areas, and have always believed that we are an interesting model of service delivery, because of our flexibility and our low core cost to the main agencies that fund us—the Scottish Arts Council and Highlands and Islands Enterprise. The tenor of our discussions with the Cultural Commission has been to advance us as a model for taking a more regional approach to the delivery of cultural services throughout Scotland.

Mary Scanlon: As you did not provide a written submission, can you tell us whether any aspect of the bill will be detrimental to the delivery of your service throughout the Highlands and Islands?

Robert Livingston: I will say a couple of things on behalf of the charities that we work with in the sector. First, I warmly welcome the concept of the Scottish charitable incorporated organisation. The organisations that we work with have been waiting for that model for a long time, as it will give them greater protection than if they were unincorporated associations, without the complexity, cost and ethos of becoming a full-scale limited company. It is a beneficial step.

I am slightly worried that, in some respects, the bill is—understandably—slanted towards concerns about charities whose prime purpose is to raise money from the general public for further dispersal. Obviously, most charities in the cultural sector provide a service to the community, and most of the funding that they receive is either proper earned income from ticket sales or other

activities, or grant aid from various public and private bodies. As my colleagues have said, such grant aid is already thoroughly regulated and audited.

I therefore recommend that indirect public benefit be formally incorporated in the bill. I have seen that discussed in a number of papers. Quite a few charities would be viewed as giving indirect benefit, for example friends organisations, such as the Friends of Eden Court, which arose to aid another charity in delivering benefit to its constituency. I slightly worry that they may fall foul of the public benefit test. I feel similarly for those bodies that are fixed on a particular kind of activity, and whose members provide an indirect benefit to the wider community.

Linda Fabiani: I seek quick clarification from Mr Jackson. Following from Mary Scanlon's question about observers, are the councillors on your board full voting members or are they there on a co-opted basis?

Keith Jackson: They are full voting members. I remind the committee that the council's submission states that we also are a fully independent company limited by guarantee.

The Convener: That concludes the committee's questioning. I thank you all for appearing. We are particularly grateful to Mr Jackson, who came along at short notice at the request of the City of Edinburgh Council, when we discovered that COSLA was not going to appear before the committee today. Thank you for your written submissions. All committee members found them helpful.

The committee will be suspended for five minutes to allow for a short comfort break and a changeover of witnesses.

10:15

Meeting suspended.

10:23

On resuming—

The Convener: I welcome everyone back to the meeting. We are joined by our second panel of the morning, which is comprised of Eilidh Whiteford, the policy and public affairs co-ordinator of Oxfam in Scotland; Kate Higgins, the policy and parliamentary affairs manager of Capability Scotland; and Colin Armstrong, the head of regeneration services in the Wise Group. I thank all of you for your helpful written submissions to the committee, which have informed committee members' lines of questioning.

I start by asking a similar question to the one I asked the first panel, on the Executive's

consultation. Was the consultation fully inclusive and comprehensive? Has the Executive given sufficient consideration to the responses that it received?

Colin Armstrong (Wise Group): We were happy that the documentation was clear and comprehensive. The issues were set out very well. We responded only on one substantive issue, which we mention in our written submission to the committee. We are concerned about the regulatory burden and believe that an independent review should be carried out periodically to ensure that an undue burden is not placed on the charitable sector.

Dr Eilidh Whiteford (Oxfam in Scotland): The consultation documents were clear. Also, Oxfam in Scotland was represented on the bill reference group. Not a large number of charities were on that group, but we were. We have no complaints in that direction.

Kate Higgins (Capability Scotland): We make reference in our written submission to the fact that Capability Scotland has been here for the long haul, since the beginning of the McFadden commission. We appreciate that having such a lengthy process has been frustrating, but we think that we will get better law because of it.

The Scottish Executive has taken on the comments and views of the sector, and that is reflected in the changes that have been signposted along the way. It was particularly helpful that, following the report of the McFadden commission, working groups were set up to examine particular issues that needed further consideration and work. Capability Scotland was heavily engaged in that process as well. Generally, we hope that the long timeframe will result in a better piece of legislation being passed, which is to be welcomed.

The Convener: It has been suggested that there should be a statutory duty on OSCR to provide advice to the voluntary sector. As key players in the sector, do you think that a statutory duty on OSCR to provide guidance on governance would be appropriate?

Colin Armstrong: We would welcome any good-practice advice. In the course of its duties, the regulator will come across examples of good and bad practice. If it could give a steer to the sector on which practices are more appropriate, that would be helpful.

Dr Whiteford: I do not have a strong view on whether that should be a statutory provision. Obviously, it would be helpful if OSCR were able to give advice to charities. I am not sure whether there might be contradictions or tensions between its role as the regulator and its advisory support

function; however, we do not have a strong view one way or the other.

Kate Higgins: We previously expressed concern about the need for a firewall between the two functions. Although we agree with Colin Armstrong that there is a need for guidance and good-practice advice on governance to be made available to charities, if it does not fall to the regulator to provide that information, who will provide it? There is a danger that, as a result of the bill, it will not be provided at all and that the issue will be left aside and will not be addressed. However, if the regulator is to play that role, there must be provisions in the bill to give it that role.

We would like there to be clear guidance about the creation of a firewall. The last thing that we want is for a charity to approach the regulator for advice that, ultimately, crosses over into issues of monitoring and regulation, so that the charity finds itself subject to the regulatory function. There must be a protocol or firewall in place.

Patrick Harvie (Glasgow) (Green): Good morning. I want to ask about the first part of the charity test—the list of charitable purposes, which is not identical to the list of charitable purposes in the UK bill. Do panel members foresee that causing any problems? If so, what might those problems be?

Dr Whiteford: We welcome the charitable purpose heads that the bill outlines, as they are a marked improvement on what has been used before. On the wider issue, hypothetically, the bill's divergence from the UK bill might be a problem if, for tax purposes, the Inland Revenue chose to follow the charitable purposes that, over time, developed in England and Wales as the accepted heads of purpose although, in Scotland, case law had diverted from those. Potentially, although an organisation had charitable status in Scotland, it might not have charitable tax status for UK tax purposes. However, I do not think that that will be an immediate problem.

We have certainly sought to gain alignment between the UK and Scottish definitions but, at the same time, we do not think that Scotland should dumb down to go along with a lesser definition at the UK level.

Patrick Harvie: Does anyone else on the panel want to comment on that?

10:30

Kate Higgins: Capability Scotland is happy with the test and the criteria that have been set; they are a vast improvement on what was being proposed in the draft bill.

As a Scottish charity operating wholly within Scotland, we could say, "Who cares if the

legislation is misaligned?" However, we understand the wider concerns of the UK-based charities with whom we work closely. Throughout the process, we have heard the comments and views being expressed by the Inland Revenue. Unless it has changed its position, it is going to go with the definition in the UK bill, so there is a case for the Scottish Parliament to speak to UK-wide bodies such as the Inland Revenue and educate them on what devolution is all about.

Patrick Harvie: I would love to.

Colin Armstrong: We are a Scotland-based charity that operates in England, so we are quite keen that there should be as much alignment as possible so that there is a level playing field in both localities. However, I confess that I have not examined the English proposals, so I cannot talk about them in detail.

Patrick Harvie: Are there any equalities issues around the list of charitable purposes? Do you believe that the list is sufficiently comprehensive in that respect?

Dr Whiteford: It is a significant improvement on what has gone before.

Colin Armstrong: We do not have any concerns in that area.

Kate Higgins: The fact that the bill does not mention equality per se is an omission. It would improve the criteria if that option was included. Other than that, the criteria are fairly comprehensive and, most important, the bill will give the general public a clear steer on what constitutes a charity in Scotland.

Patrick Harvie: Are you saying that you feel that there is a case for making the promotion of equality or equal opportunities a specific item in the list of charitable purposes?

Kate Higgins: I do not see why not. The issue did not jump out at us but we will go back and consider it, because Capability Scotland is obviously concerned with equal rights and the promotion of equality for disabled people. The organisation is well covered by a large number of the definitions, so it did not strike us as an omission. However, we will go back, have a look at the issue, do some consultation and if disabled people feel that it is an omission and that it would be helpful for that to be one of the criteria, we will certainly support such an amendment.

The Convener: Capability Scotland is an equalities organisation that has a proven track record of campaigning on such issues and is an organisation that will be affected by the legislation. If it does not feel that the proposals in the bill will give it difficulties, would it be wrong of the committee to assume that an additional criterion might not offer added value?

Kate Higgins: Capability Scotland is probably not best placed to answer that because it is a service provider. We provide care and services as well as being a campaigning organisation, so we are covered by other criteria. Perhaps the question should be put to more narrowly defined organisations that might feel that promotion of equality in a campaigning sense rather than in the sense of service provision is their *raison d'être*, which might mean that they do not satisfy the charity test.

Mary Scanlon: The charity test takes no account of existing case law but instead has criteria for meeting public benefit. What are your views on the public benefit test? Does it offer enough flexibility?

Colin Armstrong: I think that we are quite happy with the public benefit test. Certainly, as far as it applies to ourselves, we do not have a concern.

Mary Scanlon: Although my next question follows a favourite theme of mine, it also relates to your submission, in which you say:

“The vast majority of our income comes either in the form of grants from public sector organisations ... or from contracts to deliver public services”.

Do you feel that you can still satisfy the key principle of independence?

Colin Armstrong: Yes, we are very happy that we can do that. We are not an arm's-length organisation like some of the members of the first panel are; we are wholly independent. It is open to us to turn down a grant or contract if we feel that it is inappropriate or inconsistent with what we want to achieve.

Dr Whiteford: Similarly, we are very happy with the public benefit test.

Mary Scanlon: Section 14 allows exceptions from the registration process for charities that do not occupy any land or premises in Scotland—I think that the bill talks about a significant presence, although, clearly, that has not yet been defined. Will the provision leave a gap in the regulation of bodies that fundraise in Scotland using methods such as television or internet appeals?

Dr Whiteford: As far as I understand it from reading the accompanying documents to the bill, the changes that were made to the draft bill were made on pragmatic grounds. In the evidence that Oxfam submitted to the Executive's original consultation, we raised the issue on the ground of the bill's workability. We feel that there is the potential for OSCAR to find itself regulating charities that have no significant base in Scotland. Obviously, Oxfam has a significant presence in Scotland and would be required to register. Our

wider concern relates to the lack of specificity in the bill around the extent and limit of OSCAR's power in respect of charities that operate across the UK and that have significant operations in Scotland and in other countries.

Mary Scanlon: Could OSCAR audit, monitor or regulate charities that advertise in Scotland by means of the internet, national newspapers and television but do not have a base in Scotland? I am thinking of charities whose base is elsewhere in the UK or the world. Will OSCAR be able to monitor them?

Dr Whiteford: Personally, I think that that would be a major logistical challenge; I do not know how it would be done. Given the information age in which we live, I do not know how fundraising through the internet or by television advertising can be regulated. That does not mean to say that it could not be done, but it would require OSCAR to have a very different capacity from what is envisaged.

Mary Scanlon: It certainly would be a challenge.

I will move on to address a point on fundraising that Capability Scotland raised in its submission. I will use my own words, but basically it said that funds that are raised in Scotland should be spent in Scotland. Perhaps that was not quite what was being said. Will Kate Higgins explain what was meant by that?

Kate Higgins: Capability Scotland is concerned about the gap that exists in the bill. We echo Oxfam's concerns that, even if it is a logistical nightmare for OSCAR, the regulation must be done. There are numerous instances of charities that are based in England spending the funds that they raise in Scotland across the border. Other charities, by signing up campaign supporters or members of their organisation, will have the capacity to carry on as they are without being subject to regulation in Scotland. If those organisations are raising funds in Scotland, we feel that they should be subject to the same regulation as all other organisations, whether they are UK-wide or stand-alone Scottish organisations.

Mary Scanlon: If we tell organisations that if they raise funds in Scotland, they must spend them in Scotland, we must take account of organisations such as Cancer Research UK, which gave a presentation to the Parliament two weeks ago. It is worried that regulation of any sort might be introduced, because the researchers in Scotland—in Dundee, Edinburgh and Glasgow—are the people at the cutting edge of new technologies for cancer, and the majority of their money is raised elsewhere in the UK. The witnesses said that if, because of devolution, we

were to say that what is raised in Scotland must be spent in Scotland, that would mean that many of our best researchers would have to move elsewhere in the UK. Might not that be a dangerous path to go down?

Kate Higgins: I say, with respect, that that is not the point that Capability Scotland is making. The point that Capability Scotland is making is that there are organisations that are based wholly in England and Wales—they provide their services there, the locus of their remit is there and they are registered with the Charity Commission for England and Wales—that might have signed up campaign supporters or members in Scotland or might take part in UK-wide fundraising campaigns that include Scotland, although the money goes back down south to be spent. In our written submission, we asked the committee to seek clarification on whether those organisations would be subject to regulation by OSCR, because we feel that that is an omission. If they are raising funds in Scotland, they should be subject to the same regulation as everybody else is. Cancer Research UK will be subject to the regime in Scotland, as it is subject to the regime elsewhere in the UK. Its situation is not the one we have concerns about.

Mary Scanlon: Is not it the case that the money should be spent at the point where it provides the greatest utility value and the greatest public benefit? In the case of research, that might be either in Scotland or in England.

Kate Higgins: We do not have a dispute with that, but we have a concern about organisations that are not operating in Scotland but which raise money here to spend on services that are wholly operated in England, Wales or Northern Ireland.

Mary Scanlon: Do you accept that that works both ways and that it could be beneficial to Scotland?

Kate Higgins: I am sorry, but I repeat, with respect, that that is not the concern of Capability Scotland. We have no issue with the situation of UK-wide bodies that apply their funds, expertise and services across the whole of the UK. Our concern is about wholly English-based services, and I can give you a really good example. We know of a children's disability organisation that operates entirely in the north-east of England. It regularly sends collectors up the A1—

Mary Scanlon: That issue has been raised with the committee quite substantially. We have addressed that.

Kate Higgins: It sends collectors to do collections in Edinburgh, but none of the money raised in Scotland is spent here. However, it gives the impression that it is spent here, because I have encountered a number of times the claim

that the money that is being raised from people living in Scotland is going to be spent on disabled children in Scotland, and it is not.

Linda Fabiani: I might have missed my chance to ask my supplementary question, but I will ask Colin Armstrong about the evidence that we heard from the City of Edinburgh Council and its arm's-length organisation. I know that the Wise Group is a company limited by guarantee. Will you tell us about the make-up of your management board?

Colin Armstrong: The board is made up of eminent individuals who have an interest in promoting employment. They range from councillors to—until recently—an MSP, an MP and Will Hutton, who is a prominent journalist.

Linda Fabiani: So you do not have a set proportion of places—33 per cent, for example—for people from any particular sphere.

Colin Armstrong: No. We do not have a quota for any kind of member. The position has just developed over the life of the organisation.

Linda Fabiani: So you do not have the same concern that others might have that you could be seen as being run by a secondary organisation.

Colin Armstrong: Some of the board members are from funder organisations, so a link could be drawn there. For example, we have a councillor from Glasgow City Council and we do work with Glasgow City Council. Is that undue influence? The question could be raised, but I think that we have sufficient members of the board—I am struggling to work out whether it is a majority—who are not in that relationship to ensure that a member who was in such a relationship could not dominate the situation.

Linda Fabiani: Thank you. I think that Capability Scotland has been quizzed enough, so I shall have some words with Oxfam in Scotland.

I was interested in Oxfam's submission because, apart from anything else, it let us see the extent of the work that Oxfam does worldwide, in 70 countries. I was surprised by how many countries you work in. I also note in your submission that you have issues about regulation and registration being dealt with in guidance rather than being included in the bill. Can you clarify why you are particularly concerned about there being a different approach in Scotland from the approach in the rest of the UK, given that you operate in so many other countries and must have different regulations and requirements to meet?

10:45

Dr Whiteford: I am happy to talk about that. In the bill as introduced, no distinction is made between the regulation of all a charity's activities

and those that just happen in Scotland. We perceive that as a problem. The Charity Commission for England and Wales currently regulates Oxfam and we do not want a burden of dual regulation, whereby we have to do everything twice. That would be counterproductive to the bill's aims of trying to improve how charities are regulated. We believe that the Charity Commission regulates us effectively and we want charity regulation in Scotland to improve standards up here. However, we do not want extra administrative and cost burdens from having to do everything twice.

On regulating charitable activities in Scotland, we argue that there is a parallel in company law, whereby if a UK-wide company is working under another jurisdiction, its activities in that country are regulated, but the internal workings of the company headquarters, wherever else those might be, are not regulated by that country. We believe that that is a relevant model. We are concerned that the bill does not provide many guarantees on regulation. We have had many helpful discussions about the bill's intentions and the policy memorandum, and those have very much allayed our fears. However, what is in the bill currently does not reflect the discussions that we have had.

Linda Fabiani: My concern is that being very prescriptive in the bill in relation to setting up OSCR as a new organisation might restrict the flexibility that we might well want to take advantage of further down the line. Can you understand that argument? What I am trying to get at is why it is so important to you that registration and regulation provisions be in the bill rather than in secondary legislation, for example.

Dr Whiteford: There is a question about enforcement. Obviously, it is hard to get legislation that fits every situation, but a large number of UK-wide or international charities have operated in Scotland for many years and have a strong base here; nevertheless, their internal governance is elsewhere in the UK. I am certainly not a lawyer and I do not have a legal background, but our lawyers are concerned that there could be problems in interpreting the law further down the line if the bill is enacted as it is and put into practice. There are concerns that there could be problems if the limitations of OSCR's remit with regard to UK charities are not clarified in the bill. As it stands, there would be dual regulation.

Linda Fabiani: It is useful that you are here, because Oxfam is probably one of the biggest charities that operate worldwide from the UK. Do you operate in other European Union countries?

Dr Whiteford: Oxfam International has affiliates in other EU countries. UK Oxfam has operations in 70 countries. I would need to check, but I do not think that UK Oxfam has operations in other EU

countries. We have a UK poverty programme here in Scotland and in other parts of the UK. Therefore, although we have programmes, I do not think that we have other EU programmes. We perhaps have such programmes in the new, extended EU.

Linda Fabiani: That is what I was trying to get at. I wanted to know whether you are operating in the EU as a core charity rather than through affiliates. Do you come up against problems in other EU countries in relation to registration, regulations and having to fill in loads of forms?

Dr Whiteford: I would have to check that, because Oxfam in the Netherlands and Oxfam in Germany are independent and would be subject to those countries' legislation. We might still have programmatic work going on in the new EU member states. I do not have that information at my fingertips, but I could certainly find it.

Kate Higgins: I want to comment on that, because there is a divergence of opinion on it. Although Capability Scotland plays a big role in the Institute of Fundraising, we, like all good democrats, go with the majority view. Although we share the concerns of UK-wide organisations such as Oxfam, our view is clear that there has to be equity for all charities operating in Scotland and so the regulatory framework in Scotland should apply to all charities operating in Scotland, whether they are stand-alone Scottish organisations or UK-wide ones.

Donald Gorrie: I want to pursue that with related questions on dual regulation. Is it possible to make distinctions in relation to the activities of a charity in Scotland that would be regulated by OSCR and have its governance regulated by the English Charity Commission or the equivalent French body? Is it possible to ensure that every organisation is properly regulated in a country for its basic activities and in each country for its activities in that country? That would create a level playing field.

Dr Whiteford: That is what happens with company law. An English company is subject to the Scottish regulatory framework in relation to its work on the ground in Scotland, but it is not subject to interference in its management or activities in other jurisdictions. I agree with Kate Higgins that there needs to be a level playing field, but the regulatory framework has to be proportionate—the bill team has already taken that point on board.

We welcome the duty that the bill imposes on the regulator to co-operate with other regulators. That obviously depends on other regulators' willingness to co-operate. We are reasonably confident that an equitable solution can be found. I stress that it is important that such solutions are

found if UK charities are not to find themselves under a massively increased burden of dual regulation and having to do things twice. That would not increase public confidence in the organisations and it would not enable them to work efficiently, as we do currently. We are saying that we need a smooth transition and we do not want extra burdens to be placed on us to do the same things twice.

Donald Gorrie: The Wise Group does not have as much of an international problem but, in its written evidence, it makes the point that it is already audited up to its eyebrows by Companies House and does not want to be audited yet again. Would it be possible to have a system that ensured that the Wise Group and similar organisations were properly audited by a companies body and then had OSCR deal with the charitable aspects of their work?

Colin Armstrong: I guess that that is an option. In our submission we said that charities are such a diverse group of organisations that it was probably hard to come up with wording in the bill that would cover all the options. That is why we suggested having a regular independent review whereby the regulator would have to justify the regulatory burden that it was placing on the charity sector. If the problems that we have been discussing to do with dual regulation came to light, we would have an opportunity to revisit the situation and change practices. If Parliament believed that it would be possible to encapsulate that within the bill, we would welcome that, but we do not have a good idea of what wording would achieve that.

Donald Gorrie: The idea of a review is worth considering. You have no particular proposition as to how we could try to prevent mistakes being made in the first place.

Colin Armstrong: We could give some thought to what would suit our particular circumstances, but the charities sector is so large and diverse that what would suit our circumstances would probably not suit other organisations such as Oxfam. We wondered whether it would be possible to put something in the bill that would cover all circumstances.

Donald Gorrie: Does Kate Higgins think that it would be satisfactory if every charity had its accounts and governance properly scrutinised by somebody but just its activity in Scotland scrutinised by OSCR, or does she think that any charitable organisation that operates in Scotland should be open to total regulation by OSCR, no matter what regulation it is subject to elsewhere?

Kate Higgins: We are quite relaxed about the form that the regulation will take as long as the effect is the same. We are concerned that, as we have seen with the definition of charity, there will

be divergence, even if it is not huge. Any divergence creates a playing field that is not level. We do not want Scottish charities to be subjected to much more rigorous scrutiny, higher fees or more hoops to go through than UK-wide charities have. There has to be a level playing field.

The view of the general public is most important in all this. The public have to feel confident in the operation of the sector throughout the UK. We are all well aware of how everyone gets tarnished by scandals. No one escapes when there is a charity fundraising scandal, wherever it happens in the UK. Our view is that what has to happen in order to reinforce public confidence should happen. Everything that we have said about the need for a level playing field has come from that perspective. People have to feel that everyone is subject to the same rules so they can hand over their money in the confidence that its disposal will be scrutinised in some way and that it is going to the purpose to which they think it is going.

To pick up on an earlier point, Capability Scotland is also a registered company and is audited to the hilt. To date, that has not been an issue that we have picked up on as important and we are fairly relaxed about jumping through more hoops because we have to satisfy Companies House requirements as well as the new OSCR ones. The view of our outgoing director of finance, who was heavily engaged in this process and is now engaged in the process at OSCR, was that we are already audited once, so we can soon send OSCR another copy. We do not think that there will be too many hoops to go through. Our overriding view is that if it has to happen to give the public confidence in giving to Scotland's charities, which has suffered over the years because of different scandals, then it has to happen.

Donald Gorrie: In my experience, the same audit would never be accepted so the organisation would have to jump through a different hoop. It is not just about sending photocopies of one set of accounts. However, what you have said is very helpful.

Scott Barrie: Should there be different thresholds for accounting purposes for charities of different sizes? That would achieve some sort of proportionality for charities ranging from very small and locally based charities to huge multinational charities such as the one in which you are involved.

Dr Whiteford: Yes, we would expect to have to provide very full audited accounts as we do at the moment. However, that might not be proportionate for smaller charities, especially for those that have only one member of staff, or that have no members of staff and are run entirely by volunteers. That would not be a practical or fair

use of the very limited resources that such charities have. That is exactly the kind of proportionality that the bill seeks to address.

Kate Higgins: We entirely agree with Oxfam in Scotland's view on that matter.

11:00

Colin Armstrong: We agree too but would make the additional point that the source of the income should be considered. There is a distinction between charities that receive substantial donations from members of the public for which there is no clear accounting line in respect of where the money has come from or the donor's intention and organisations such as ours whose income is entirely derived from a grant from a public organisation or through a contract, in which case the intention behind giving the money is absolutely transparent. All the money is audited and where all of it has come from is clear.

Linda Fabiani: I must pick up on that point. I would have thought that outputs should be just as transparent and therefore that quite detailed scrutiny of how the money is spent, no matter where it comes from, is needed.

Colin Armstrong: I am suggesting that there is detailed scrutiny. People who give grants or enter into contracts with us put in place monitoring frameworks and appraisal criteria when the grant application is assessed. Audit regimes come along after the event. Therefore, there is substantial scrutiny of everything that we do. I suggest that other sources of income do not have that level of scrutiny. That takes us back to whether a double scrutiny is involved. If the regulator comes along after the event and considers a grant that has been substantially appraised, audited and monitored over a period of years, will subjecting the project or source of income to further scrutiny add anything to the public benefit?

Linda Fabiani: Are you making a case for the likes of the Wise Group to be placed on the same basis that might apply to housing associations, for example, which are already monitored by Scottish Homes?

Colin Armstrong: That would be welcome. I take Donald Gorrie's point. Every organisation seems to invent its own audit regime and what is done must be rejigged to suit different people's criteria. *[Interruption.]*

Linda Fabiani: A fire alarm test announcement is saying that we should ignore all messages until further notice, but that does not mean that I should be ignored, Colin.

The Convener: I understand that the alarm is only a test, so we should continue as normal and hope that the voice does not become too loud.

Have you concluded, Linda?

Linda Fabiani: I have—thank you.

Cathie Craigie: Part 2 of the bill aims to lay foundations for the statutory regulation of charity fundraising. Earlier, Kate Higgins mentioned public confidence in charitable organisations and people out there competing for the money that is available to be given to charities. Will the bill help to boost public confidence in charitable organisations?

Kate Higgins: I am not convinced that the public really care about the inner workings of organisations, exactly how OSCR will work and the framework that will be set. Members of the public want public confidence in the end product and it is our job to collaborate and work in partnership to ensure that the bill produces an end job that will engender public confidence, which, substantially, it will. The bill has had a long haul and a wide range of people have scrutinised it.

Eilidh Whiteford mentioned that there are still concerns about how much will be left to guidance and secondary legislation. By the same token, Capability Scotland among others might argue that, as we are in what is almost a brave new world, there must ultimately be flexibility, although perhaps some crucial issues relating to dual registration need to be covered by the bill.

The bill will create a much better framework. It will give people somebody to approach if they have concerns about charities, which was a major concern. If, as a result of the bill, the public in Scotland continue to give generously to charities that work here, throughout the UK and elsewhere, and can increase their giving and feel that we all do a good job, the bill will have achieved its goal.

Cathie Craigie: Oxfam in Scotland says in its submission that it shares the Institute of Fundraising's concerns about the bill. Will you expand on that? I do not know whether all members are familiar with those concerns.

Dr Whiteford: I will follow on from what Kate Higgins said. In general, we support the bill, which will create a better climate. If we do not have co-operation on dual regulation, the only caveat is that that will have the capacity to reduce confidence in charities because we will spend much more on administration. That is a major issue of public confidence with which we wrestle.

We share the Institute of Fundraising's concern that it would be unfortunate to miss the opportunity to create consistency in local authority licensing and its enforcement by ensuring that local authorities comply with the guidance that the Parliament or OSCR issues. It would be a pity if

this great new bill were undermined by being unenforceable.

Cathie Craigie: What leads you to believe that local authorities might not comply with the guidance that will be issued?

Kate Higgins: We also contributed to that evidence and we echo the sentiment. The concern is about whether local authorities must follow or refer to the guidance. The wording needs to be tightened for the duty on local authorities to heed the guidance. I do not wish to go into the argument, but we can have statutory guidance or guidance to which local authorities can refer while making up their own minds. We would prefer statutory guidance.

Dr Whiteford: I hesitated before answering Cathie Craigie's question because the words that were coming to my lips were that I had experience of such a situation from dealing with other legislation. Kate Higgins's point is well made. If local authorities do not know whether they must or should do something, that is confusing. It would be great to tighten up the provision.

Cathie Craigie: What criteria should OSCR specify for a designated national collector?

Dr Whiteford: We are pleased with the proposed flexibility. In general, we refer to the Institute of Fundraising's evidence to the committee, which is in line with our views.

Mary Scanlon: The Wise Group's submission says:

"We estimate that the burden is equivalent to five full-time members of staff."

I will follow up Donald Gorrie's and Linda Fabiani's questions. Do you mean the burden of regulation from the bill?

Colin Armstrong: No. The reference is to the burden that we are subjected to from the various grant regimes and Companies House.

Mary Scanlon: Are you saying that you need five full-time members of staff to deal with regulation, administration and such matters?

Colin Armstrong: I am not talking about administration. Those staff deal solely with complying with the regulations that are associated with the requirements to provide audited accounts to Companies House and complying with the various grant regimes that we are involved with.

Mary Scanlon: So you have five members of staff to do that.

Colin Armstrong: We have the equivalent of five members of staff. They are not necessarily five individuals.

Mary Scanlon: I appreciate that. How much will regulation under the bill add to what you call a burden?

Colin Armstrong: That is difficult to calculate from the bill. I return to what I said earlier. The proof of the pudding is in the eating as to what will be involved in complying with the regulatory process.

The Convener: Have you finished your questions, Cathie?

Cathie Craigie: Yes. I had another question about local authorities, but it has been answered.

The Convener: No other members have questions, so I thank the panel for spending time with us. Your answers have been helpful.

I suspend the meeting for a five-minute break to allow a changeover of witnesses.

11:10

Meeting suspended.

11:17

On resuming—

The Convener: I welcome our third and final panel of the morning. We are joined by Jane Ryder, the chief executive of OSCR, and Richard Hellewell, the head of regulation and compliance at OSCR. I thank you for making time to join the committee and for your written evidence, which was received in advance of the meeting.

I will start by asking a couple of questions about the independence, or perceived independence, of OSCR. It has been suggested to the committee that the independence of OSCR may be undermined by section 2(4) of the bill, which gives Scottish ministers the power to direct OSCR on the form and content of its annual report. Do you share that concern?

Jane Ryder (Office of the Scottish Charity Regulator): I confess that I do not share that concern. It is appropriate for the form and content of the accounts to be directed by ministers. As we say in our written submission, there are many other opportunities for scrutiny and challenge of OSCR, which should both secure its independence and, I hope, ensure that it is seen as independent. Apart from the duty to publish an annual report, we have a duty to publish reports into inquiries and a duty to respond to freedom of information requests. A five-layered review and appeal mechanism is available to applicants. We will also be sure to embed quality assurance. We already have user panels and I am sure that OSCR intends to continue to have them. Therefore, I think that there are sufficient wider

opportunities to ensure public accountability and I am not troubled at all about the independence of OSCR.

As we say in our written evidence, in the consultation on the bill, several options for the form of OSCR were considered. There are advantages and disadvantages to all those models. From the regulator's point of view, it was critical to get the balance right between our having sufficient authority and our having sufficient operational independence. I am content that the model that has been developed secures that.

The Convener: Could the perception of some key stakeholders in the sector that there is a question mark over your independence cause difficulties during the initial operation of the bill as it is currently drafted? If so, how will you try to address that?

Jane Ryder: We will continue to develop the approach that we have taken so far. That approach has been widely consultative, involving all our stakeholders, which include the charities and the public. We will act on the feedback that we receive, which is what we are doing at the moment. For example, we recently ran a pilot monitoring programme, which consisted of wide public consultation and involved 300 charities. We took the responses that we received into account and modified the programme. I was pleased to hear that, at the Finance Committee last week, the SCVO said that it was "delighted"—that was the word that the witness used—that we had modified our programme in response to the evaluation and the comments of the monitoring reference group of key stakeholders that we had set up.

The Convener: On the issue of independence, the committee has heard evidence in relation to section 97, which could allow Scottish ministers to make an order allowing a body to refer to itself as a charity even if it was not on the register. Do you believe that that provision could undermine the ethos of the bill and the independence of OSCR in treating all bodies equally?

Jane Ryder: My understanding is—and the section heading firmly states this—that that is a transitional provision and will be time limited. Section 97(3)(a) states that a ministerial order will apply

"for such period as may be so specified".

I am quite sure that the policy intention is that that will be a transitional provision and that it will be regarded as such in the implementation. If, for example, the bill had stated that that provision would apply to any organisation with a Scottish Charities Office number, I am not entirely satisfied that that would have caught every charity, because of potential administrative problems.

Mr Home Robertson: Paragraph 5.2 a) of your written submission states that you would like OSCR to have

"a specific remit to advise Ministers".

Have you discussed that with the Executive? If so, what reaction have you had?

Jane Ryder: We have discussed that with the bill team. The bill team was of the view that that remit was implicit; we simply wanted to avoid any doubt about it. I also felt that, as that role was explicit in OSCR's remit as an executive agency, it would be slightly curious if it were not made explicit in OSCR's remit as a non-ministerial department.

Mr Home Robertson: Can we take it that you would like that to be made explicit?

Jane Ryder: I would like it to be made explicit.

Donald Gorrie: As far as I can see, the bill sets out your functions but does not tell you what you are there for. Would it be helpful if some objectives or an underlying purpose or philosophy were to be included in the bill?

Jane Ryder: We have discussed that in some detail, but I am not sure that it would be terribly helpful. Our objectives have been focused on developing and maintaining public confidence. However, I would like that to be, within two to three years, ancillary to our primary purpose of helping charities to account to the public, through the regulator and directly, for the benefits of their status.

Objectives will change over time and I am not sure that it is helpful to treat legislation as a corporate plan. I am content with the functions. Certainly, the sort of objectives that the Charity Commission for England and Wales are being given are a step too far for OSCR at this stage—that subject was discussed at length in the consultation. For example, from our starting point, the commission's objective

"to promote the effective use of charity resources"

goes too far from regulation into management.

Donald Gorrie: If, after a few years, the Scottish charity scene has not progressed that much, so that, although everyone is honest, it is pretty dull, would that situation be okay or do you want charities to develop so that they are not only honest but livelier and more enthusiastic?

Jane Ryder: Certainly, we would aim for that from the start, although we would do so very much in conjunction with the sector, as that is not our primary responsibility. The sector has shown how much it welcomes regulation, but also how much it believes—and I agree—that regulation needs to be proportionate and to have a light touch. The

sector needs to develop itself; it needs to stand on its own two feet.

Linda Fabiani: Section 1(3) of the bill says:

“OSCR may do anything ... which is calculated to facilitate, or is conducive or incidental to, the performance of its functions.”

You have said that you would like section 1(3) to be expanded so that you are given a more specific advisory function. Will you expand on what you mean by that? How would you respond to the other organisations and umbrella bodies that have said that they are best placed to advise charities?

Jane Ryder: There is a spectrum, which starts with the simple exposition of the law; it starts with the statement, “This is the law. We will not give you any guidance or explanation.” That sort of Kafkaesque statement says that people should be able to understand things as they stand. The spectrum moves through to general guidance, which is a function of OSCR. We have already started to produce some general introductory guides, including one on accounting regulations and another on trust reorganisation. We are producing general guidance that is based on evidence and practice.

The spectrum moves on to offering advice, as described in paragraph 5.2 of our submission, which we discussed earlier. It is appropriate—and I hope that it is agreed that it is appropriate—for OSCR to advise, facilitate and make recommendations to charities where there is cause for concern, instead of simply exercising intervention powers. Although we need intervention powers to deal with a small number of cases, the majority of cases can be dealt with as per our current practice. I am sure that the intention for OSCR’s future practice is that we should facilitate compliance. I would much rather see prevention than cure; I would also much rather recommend than intervene.

The spectrum moves on into what I think is a cause for concern for charities, which involves OSCR giving specific advice when a charity asks us what it should do in a certain situation. However, people are already regularly coming to see us on that basis. Where we can, and where there is an obvious other reputable and assured source of advice, we direct charities to that source of advice. For example, on accounting matters, we send charities to the Institute of Chartered Accountants of Scotland. One of OSCR’s roles is to work with intermediaries such as ICAS. If legal advice is needed, we send charities to the Law Society of Scotland. We also send charities to the sectoral intermediaries such as the SCVO or one of the other umbrella groups, which have an important role to play.

That is the spectrum. I do not see OSCR’s role as being to engage in the direct training of trustees, for example. We would not give out that sort of direct advice. However, we regularly appear at seminars that are organised by charities or advisers so that we can give attendees the benefit of our experience to date.

Linda Fabiani: In relation to your capacity to advise, I agree that it is beneficial if advice can be given before someone gets to the stage that they are in trouble—in other words, at the pre-intervention stage.

Part of the discussion that we had a few weeks ago with a panel of lawyers centred on grant-making trusts. It was suggested that it would be a benefit to those trusts if potential philanthropists knew a bit more about how to give and how that money could be used. Someone on the panel felt that it would be useful if OSCR were able to be quite up front on advice in such areas. Do you agree with that?

11:30

Jane Ryder: That comes into the area of general advice on what the benefits would be. The issue strays into the discussion that you had with the previous panel about fundraising and the importance of the public having confidence that the funds that they give to charities will be well looked after and appropriately used. I agree that OSCR would have a role in giving general guidance, but I do not think that it would have a role in, as it were, setting up—

Linda Fabiani: Would that be the distinction, in your mind?

Jane Ryder: Yes. We would have a role because the issue of deciding whether a body meets the charity test passes to us from the Inland Revenue, which currently has a facilitative approach to that. In other words, it does not simply send an application back and say, “Try again.” Rather, it outlines its recommendations and suggests areas that might be changed. OSCR would aim to take that approach as well.

Mr Home Robertson: In the first paragraph of your written evidence, you say that you do not think that there is a policy requirement for the list of charitable purposes to be different in Scotland from that in the UK Charities Bill. That statement is made with reference to sections 7(2)(j) and 7(2)(k) of the Scottish bill, which relate to the provision of accommodation and care for various categories of people with special needs. Can you foresee any situations in which such distinctions arising from the fact that the two bills were not absolutely reconciled might cause difficulties for OSCR?

Jane Ryder: The difficulty is a policy difficulty for charities rather than for OSCR, which is simply interpreting the intentions of Parliament. However, the definitions in sections 7(2)(j) and 7(2)(k) are rather narrower than the English definitions. I would not disagree with the examples that other witnesses have given you in that regard or with their view that changes should be made. The wording used in the definition of the provision of accommodation is narrower than it is in the English bill, which talks about

“the relief of those in need”

and the definition of the provision of care leaves out “youth”, which is in the English bill. That does not cause OSCR difficulty in so far as OSCR’s job is to interpret what Parliament has set out. However, I think that it would cause difficulties in so far as the policy intention is to align with the English definitions.

Mr Home Robertson: You are saying that you could implement the provisions but that you recognise that there are problems. You have said that you do not disagree with representations that we have had that those definitions should be changed. Would it be fair to take that a stage further and say that you agree that there should be changes?

Jane Ryder: I would be more than comfortable with that.

Donald Gorrie: We have had strong representations on the wording of the definitions of charitable purposes. It has been pointed out to us that the definition of amateur sport is not as clear cut as it used to be and that the boundary between amateur and professional is grey, in that, if someone is good at an amateur sport, they get lots of money to help them to win an Olympic gold medal. Furthermore, it has been pointed out to us that people who are keen on things like recreation and play are left out of the bill. I would be interested in your views on the wording of the definitions of charitable purposes.

Jane Ryder: I must confess that I have not applied my mind to the distinction between amateur and professional rugby. However, we would liaise very closely with the Charity Commission on the matter, which is common to both jurisdictions. Moreover, although it is possible for organisations whose purpose is the advancement of amateur sport to be charities, I should point out that community sports organisations might also be eligible for mandatory rates relief. We will just have to develop guidance on the matter in practice. Indeed, we might highlight that sort of example in the guidance that we have to publish on the charity test.

Donald Gorrie: Apart from what you said in response to John Home Robertson, do you have

any other views on the list of 13 charitable purposes?

Jane Ryder: We have already commented on the purposes set out in paragraphs (j), (k) and (h) of section 7(2). I have to say that I am more than comfortable with having the wider, English categories.

Donald Gorrie: Some of the religious bodies to which we spoke wondered whether, in addition to your team’s many other skills, you were competent to make a fair determination in a case involving a Christian, Muslim or some other religious organisation that was regarded by mainstream organisations in that particular faith as unsatisfactory and that held some views that non-members found pretty hostile. Would OSCR be the right body to judge whether such an organisation was a bona fide religious charity?

Jane Ryder: It would be fair to say that OSCR does not have that expertise on its staff. However, we have plans to recruit and train staff to ensure that our team is fully skilled in that respect when the charity test becomes operable. Our approach would include having discussions and liaising with the Inland Revenue, which has that remit at the moment. As our submission makes clear, we have had good discussions with the Inland Revenue and have already been able to agree the joint statement with it. We will also have discussions with the Charity Commission.

As I point out in the submission, some witnesses have stressed the importance of case law. Although case law and other precedents are important, our joint position with the Charity Commission is that, in the area of religion and in other areas in which there has been a presumption of public benefit, case law and thinking are undeveloped, even in England. Developing that area is a joint task.

Mary Scanlon: The Church of Scotland is unique in being the only religious body in the UK to have specific legislation—the Church of Scotland Act 1921—that recognises its exclusive jurisdiction over church matters. Can you override the legislative powers of the Church of Scotland or does it have unique jurisdiction that, according to the multitude of papers that it has submitted, means that no civil authority can interfere with its management?

Jane Ryder: I understand the Church of Scotland’s position. It all hinges on church matters. There is no intention either in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 or in the bill to interfere with the church’s spiritual or theological jurisdiction or competence. Moreover, OSCR and the courts have only a limited power to intervene if the organisation has

passed the charity test and if it is in a particular category of religious body.

I am perfectly comfortable with and, indeed, I welcome the removal of the presumption of public benefit in favour of any classes of charity. That approach creates consistency and, as someone else put it, a level playing field. It is exactly the right course of action to take. OSCR will exercise the powers that the bill gives it, limited as they are. The ultimate power is that to remove the designated religious status. I find it hard to envisage that that would happen, but it is possible.

Mary Scanlon: Perhaps that is for another day.

The presbytery of Abernethy and various other bodies throughout Scotland are concerned. The presbytery says:

“It is hard to imagine a power which could interfere more with matters relating to the government of the Church than that contained in Section 31(6) which confers on OSCR power to give ‘a direction restricting the transactions which may be entered into, or the nature or amount of the payments which may be made, in the administration of the charity or body’.”

I do not know about other members of the committee, but I have had letters from Orkney, the Shetland islands, the Western Isles and Abernethy. There are concerns about section 31.

Jane Ryder: Section 31 would come into operation with a religious organisation, as with any other charity, only if OSCR were satisfied that

“there has been misconduct in the administration”

or that

“it is necessary ... for the purpose of protecting the property of a charity or securing a proper application of such property”.

That is about the charitable aspect, which is tied in with the strictly secular tax relief. In fact, if I were going to quote a passage of the Bible, I would say:

“Render therefore unto Caesar the things that are Caesar’s”.

That seems to me to be the most appropriate passage in this context.

Mary Scanlon: Perhaps we will render unto OSCR some of the letters that we have received and seek some more clarification and reassurance for the church, because it seems to have a genuine worry.

You have disagreed with those witnesses who think that not being able to refer to English case law will inhibit you and the courts in reaching decisions and you have referred to your positive discussions with the Inland Revenue charities unit regarding your application of the charity test without reference to precedent. Are you confident that the Inland Revenue will grant taxable benefits on the basis of your decision and, if so, do you

think that it would be content to be statutorily bound to follow that course?

Jane Ryder: I am not sure whether the Inland Revenue would be content to be statutorily bound, but I do not think that it is within the Scottish Parliament’s competence to bind it. My understanding is that that is a reserved matter, so it would have to be done through United Kingdom statute.

On the basis of our discussions to date, we are confident that we would have a good working relationship with the Inland Revenue charities unit as it currently exists, so I do not envisage any problem. However, the charities unit is going to disband and the administration of the recognition of tax status will be removed to Bootle, outside Liverpool, so we would have to have discussions with that unit, but I can think of no reason why it would not be content to grant taxable benefits on the basis of our decisions. The Inland Revenue already has a good working relationship with the Charity Commission for England and Wales and, in a sense, the relationship with us is a triangulation of that relationship.

Mary Scanlon: You say in your submission:

“There is very little charity case law on independence of constitution”.

Do you envisage that it might be possible for a charity to pass OSCR’s test but not the Inland Revenue’s test or to be acceptable to the Inland Revenue but not to OSCR, or have your positive discussions overcome any such potential problem?

Jane Ryder: I cannot guarantee that we have overcome all potential problems, but the trend of our discussions with the Inland Revenue and the Charity Commission reassures me and, I hope, charities and their advisers in turn. There might be one or two hard cases, but that is almost inevitable, as there are two parallel bills and as the Inland Revenue is in a unique position—its position in relation to OSCR is different from its position in relation to the Charity Commission, which, under charities legislation, has statutory recognition that binds the Inland Revenue.

Mary Scanlon: You mentioned the two bills. Might a charity pass the charity test for the Inland Revenue and be acceptable as a charity in England but not in Scotland? You have mentioned that possibility already in answer to Donald Gorrie’s question, but are you sure that it will not happen?

Jane Ryder: It is like three-dimensional chess. I can say only that we are doing our best in discussions to ensure that there is alignment of definition and practice.

11:45

Patrick Harvie: I am sorry to drag you back to the previous line of questioning, but I have a supplementary to Mary Scanlon's question on designated religious charities. At a previous meeting, we discussed the provisions on such charities and the reduced powers that OSCR and the courts will have. I acknowledge that you said that OSCR will exercise the powers that are given to it, and I understand that. One of the arguments that were made in favour of having that separate status was that OSCR would not have the capacity to deal with the regulation of the significant number of charities that are regulated internally by the churches. Is that a strong argument?

Richard Hellewell (Office of the Scottish Charity Regulator): No. A large number of charities are within the designated religious bodies. Whether such charities are designated as religious charities or not, the fact that they are, in general, small in size and are controlled by a central body means that they constitute a relatively low risk subsection of the charity sector. We do not envisage that that subsection of the sector would require significant resources to regulate. That said, the act of designation and the relationship with the central body that results from it for each designated body is a positive benefit that improves regulation and makes it more efficient.

Patrick Harvie: If OSCR were given the same level of powers in relation to those organisations, would that create any practical difficulties for you?

Richard Hellewell: No.

Cathie Craigie: Chapter 3 of the bill deals with co-operation and the sharing of information. The policy memorandum states that the aim of section 20 is to reduce the additional burden of regulation on charities. To do that, it will require OSCR

"to co-operate with other relevant regulators and to share information."

From the evidence that the committee has taken, the conclusion that we draw is that people want OSCR to be able to share information with, and to receive information from, other regulators, but some of the charities that have given evidence worry about the additional burdens that might be created. Your submission indicates that OSCR is not content with section 20. You make some simple suggestions on how it could be changed. Will you tell us what discussions you are having with the Executive on that and perhaps talk us through why the bill is not sufficient to meet the aims that are set out in the policy memorandum?

Jane Ryder: We warmly welcome the duty to co-operate; our approach is that we do not regard it as being a burden. However, we have made the point to the bill team that the co-operation duty is

one-sided; it is a case of one-handed clapping. I think that that may have been an inadvertent decision rather than a deliberate policy decision. An earlier witness made the point that the provision depends on the other organisation being willing to co-operate with OSCR. We feel strongly that the principle of reciprocity should be embedded in the bill. We have had good discussions with other regulators, but having a mutual duty in statute would concentrate everyone's minds wonderfully. We want to be able to share information. It is appropriate that the way in which section 20 is drafted means that we are talking about the sharing of information with public bodies and other regulators.

The distinction between legal regulation and the hoops that charities and others might have to jump through to meet the funding conditions of grant givers or local authorities has not been drawn quite as clearly as it might be. Such a requirement might feel like regulation and look like regulation, but it is not regulation in the sense that legal sanctions are attached. It is not comprehensive because it is necessarily dependent on the application process and the selection of recipients. Some of the practical burdens that charities face are not regulatory burdens, but reporting burdens, which are imposed by their grant givers. That is an important distinction for the regulator to make.

Cathie Craigie: Donald Gorrie received a response from a witness earlier today about accounts being audited to meet the requirements of, for example, Communities Scotland. However, audited accounts can produce different information and come in different shapes. You say that regulation will not be imposed. Do you envisage OSCR co-operating with organisations to reach agreements that would meet the individual circumstances of an organisation and avoid duplication? If an organisation has already been audited and is answerable to Communities Scotland, will that financial information be accepted?

Richard Hellewell: The two keys to that will be the regulations for accounts that will come out under the bill, together with accounting standards at UK or international level. Together, those measures should handle any difficulty about possible dual requirements for accounts. We are certainly aware of the different sub-sectors in the charity sector and their different reporting needs. Indeed, we are already engaged with UK accounting standards that were set up with their separate statements of recommended practice for housing associations and other charities.

Jane Ryder: A distinction must be made between accounting regulations, which specify the records that charities are required to keep; audit, which is formal external scrutiny; and reporting

and monitoring, which is so often a feature of grant regimes. Somebody asked an earlier witness about proportionate accounting regulations and there is definitely a place for different accounting and audit requirements to account for the extent to which the charity needs to keep different records and the extent to which it needs external scrutiny.

It is true that companies are required to lodge their audited accounts with Companies House. However, Companies House is a register; it does not re-audit the accounts, nor indeed do we intend to. For example, when we issued our monitoring questionnaire and asked charities to submit their accounts, we asked the larger charities—those with incomes of over £25,000—to answer questions to draw certain information from the accounts, but the average completion time was only an hour and a half.

Richard Hellewell: OSCR has an interest in accounts from the point of view of their compliance with regulation. It is a narrower focus than audit and it would only be in an investigation that we would go behind the accounts to look at the books of account.

Cathie Craigie: That is useful. It is obvious that OSCR wants to work in a spirit of co-operation with the public bodies and organisations that are out there. Do you think it necessary to adopt a formal protocol for co-operation between yourselves and the Charity Commission?

Jane Ryder: That is inevitable, and it is welcome. In fact, I have already submitted a draft.

Donald Gorrie: That is welcome.

Some witnesses have distinguished between the governance of a charity, which might be based in England, France or wherever, and the activities of that body in Scotland. Do you think that it is possible to draw such a distinction? Would you focus on the activities of the charity to ensure that it was acting correctly and in a charitable fashion, without duplicating the governance work done in England or elsewhere?

Jane Ryder: Yes. That is what we have done so far in the few cases where that is the situation. The Charity Commission for England and Wales would refer any complaint about the activities of a Scottish charity to us, although it does have the jurisdiction and power to intervene and to regulate Scottish charities that are active in England. There would be something reciprocal here: if a serious issue arose, we would certainly liaise with the Charity Commission on who should effectively be the lead regulator in the circumstances.

I welcome the fact that the bill has clarified which charities that are not Scottish charities are required to register with OSCR. We have just carried out a freedom of information inquiry with all

32 local authorities to find out to which organisations rate relief is granted with respect to their charitable status. That has thrown up examples of both Scottish-registered and English-registered charities. I do not have the final figures yet, but we have received more than half the returns, and it appears that around 1,000 English charities get Scottish rates relief.

Donald Gorrie: I want to make sure that I have got hold of the right end of the stick. There are two aspects to your job, as I see it. One is to verify the honesty of the people running the charity and ensure that they have not salted away money for private gain, for example. The other aspect is to ensure that the charity is acting correctly—in a charitable fashion—in accordance with the rules. Is that right?

Jane Ryder: Yes, that is right. The first hurdle, as it were, is the charity test, which means ensuring that an organisation's constitution and actions are in accordance with that status. The second is to do with fraud. I would stress that, in practice, fraud has concerned relatively minor incidents. Our experience is that problems are much more likely to arise with general governance and how the trustees are behaving, rather than with embezzlement or the direction of funds.

Scott Barrie: Returning to the charity test, have you considered whether and when investigations or appeals relating to the charity test should be made public?

Jane Ryder: Yes. That is already before us. The question has arisen whether the existence of on-going investigations should be made public. There is then the question of what happens at the end of the investigation. We have issued an inquiry and intervention policy, which will assist charities and the public by setting out what they can expect. Our commitment is to treat charities with respect and discretion. We have said that we will feel free to comment at any time but, in so doing, we will take into account the rights of organisations and individuals. It is hard to be more definitive than that. We cannot, for example, say that we will not comment.

Quite often, something enters the public domain, not from us, but from a complainer or a charity. It might be in the charity's interests that we comment and say, for example, that something is not such a grievous matter, that we are simply making an inquiry or that we are not carrying out a fraud investigation. There might be issues while an investigation is continuing. The bill requires us to produce a report at the end of an investigation, to clear it with the charity involved and to publish it as we think fit. I warm to the approach taken by the Charity Commission for England and Wales, which has been publishing reports on individual investigations for the last five years or so that are

discreet and tight, with wider lessons for the sector. We recognise that it will be hard for the first Scottish charity about which a report is published, so we must handle things sensitively.

12:00

Scott Barrie: We appreciate your answer. What you seem to be suggesting is that charities would have to be considered on a case-by-case basis because you cannot be prescriptive.

Jane Ryder: We cannot be prescriptive. Quite apart from sensitivities, we have to take into account freedom of information on the one hand and data protection on the other. It is quite a juggling act.

Mr Home Robertson: We are into an area that has been lacking in Scotland until now, because the registration of charities has simply been up to the Inland Revenue. From time to time, one comes across applications for charitable status or examples of the conduct of existing charities that may be controversial—no doubt, we could all cite examples. Is it your intention to make it possible for third parties to raise objections or make representations either to the initial registration or to the continuing registration of a charity that may be controversial?

Jane Ryder: That is a procedural point and we have not got into that level of consideration. It is certainly the case that third parties have no right of appeal under the proposed legislation, and I am not sure that I think it appropriate for third parties to have a right of intervention at an earlier stage. OSCR is there for the public interest and ought to be able to act in the public interest. It is possible for a third party to complain about a charity, and we do get many such complaints, but that is rather different from objecting to the granting of charitable status. I foresee that you will get into the situation that Donald Gorrie described, where there might be sectoral politics, as it were.

Mr Home Robertson: I am not going to go to any length on this question, but the point that I am making is that it is quite possible for somebody who is promoting the case for an organisation to be registered as a charity to make their own positive case, whereas other people may have other information or concerns about what may be going on. It is quite important that they should have an opportunity to be sure that OSCR is aware of those considerations at an early stage, so that a judgment can be based on all the information.

Jane Ryder: What you are indicating is that we may well be asking for more evidence from the applicants than was the case in the past, although I know that the Inland Revenue is already asking for a little more than it did in the past.

Mr Home Robertson: Indeed. I would love to say more about that, but I will not.

Linda Fabiani: I have some concerns about section 38. As the bill is drafted, OSCR will not regulate registered social landlords that are also charities. That function will, through the Scottish ministers, go to Communities Scotland, which already regulates registered social landlords. Were you consulted about that and how do you feel about that? Do you see any chance of other regulators coming into play instead of OSCR, as I think would be allowed by the bill? Colin Armstrong suggested that charities that do not receive funding direct from the general public, as opposed to through grant-making bodies, should perhaps be treated a bit differently.

Jane Ryder: I shall start at the end of your questions and work backwards. I think that I am right in saying that Colin Armstrong was drawing a distinction between organisations that attract donations from the public and those that do not, but those organisations do attract rates and tax relief and there is no other regulator—which is one of the justifications for the introduction of OSCR—so I do not see that as a solution.

We were consulted in respect of Communities Scotland. We were clear in our original submission that that would not have been our preferred option. The difficulty, as we said in our second submission, is in striking a balance between principled consistency and pragmatism. The proposals are a pragmatic response to a sector that is, I freely acknowledge, highly regulated, and which has a regulator with intervention powers that appear to mirror those of OSCR. We can, and will, live with that pragmatic decision.

We have had some good discussions with Communities Scotland. Our concern as far as implementation is concerned is to ensure that there is a level playing field and a consistent application of charity regulation. That will be quite a juggling act for Communities Scotland, whose powers may be greater in some areas in respect of their role as regulator of RSLs, than their powers with respect to the charity aspects of the 92 RSLs that are registered charities.

You would expect me to say this, but I am not hugely in favour of further delegation to a range of lead regulators. One of the arguments in favour of the proposed legislation and of OSCR was to address the fragmented nature of the landscape. You would fragment it in a different way if you delegated to a whole series of lead regulators.

Linda Fabiani: I have a few concerns about this, although I can see the pragmatism and logic involved. One of those concerns is that many charitable RSLs use arm's-length organisations with charitable purposes and form smaller

charities. There are two aspects to the matter. First, will Communities Scotland be able to apply the charities test in all such cases, as OSCR would apply it? Secondly, is there an issue about a charity being run by the relevant core organisation, with its committee members being drawn from that organisation?

Leading on from that, what kind of discussions and arrangements with Communities Scotland would you envisage, if any? Even the degree of pragmatism that we are discussing could involve a sign-off by OSCR to say that it is happy with the way in which Communities Scotland is organising and regulating things. That would bring all charitable organisations into OSCR's fold.

Jane Ryder: That would be closer to the system that is envisaged for designated religious bodies. Under the bill, there would be a delegation by OSCR, rather than a delegation by ministers. It will be quite a steep learning curve for Communities Scotland. It is a fact of life that we will spend a disproportionate amount of time talking to Communities Scotland about 92 RSLs, compared to the remaining 29,000 other charities. That is the policy decision that has been taken, however, because of the current high degree of regulation and the intervention powers.

Ultimately, it is OSCR that is the custodian of the charity test. Section 38(1) says:

"It is for the Scottish Ministers"—

in other words, Communities Scotland—

"to exercise OSCR's functions under sections 28 to 35 (other than section 30)"

in relation to registered social landlords. Section 30 requires us to remove a charity from the register should it not meet the charity test. The area for particular discussion between us and Communities Scotland is the question of who reviews the charity test.

Linda Fabiani: So those links for discussion are already being put in place.

Jane Ryder: Yes.

Linda Fabiani: What about the fact that OSCR would have the final sign-off in relation to the 92 charities that you mentioned, and the issue of OSCR being seen to be the overarching body?

Jane Ryder: That is possible, if section 38(1) is removed.

Linda Fabiani: So you do not see any compromise position?

Jane Ryder: In a sense, it is not for us to say because that is a ministerial policy decision. If Parliament's decision is that that is an inappropriate delegation, it could fall back on OSCR having the power to sign off—

Linda Fabiani: You are saying that the bill would have to be amended before we could do that.

Jane Ryder: Yes.

Mary Scanlon: Section 7(3) says that although a body can satisfy sections 7(3)(a) and 7(3)(b), it does not meet the charity test if

"its constitution expressly permits a third party to direct or otherwise control its activities".

What, in your view, would constitute such direction?

Jane Ryder: I am sure that that has been mentioned in committee before. The existence of statutory ministerial directions would appear to be an example of that. From the regulator's point of view, it is a question of what the constitution says, at the time and on an on-going basis, but not matters of custom. For example, if the issue is the NDPBs, and if the ministerial directions are simply a matter of custom, I am not sure that that infringes the section as drafted. Strict funding conditions would also not infringe the section as it is drafted. A number of local authorities have set up independent trusts that are charities and we and they would have to consider those constitutions on a case-by-case basis.

I recognise that section 7 is causing the most difficulty. Again, it is for OSCR to implement that which Parliament has legislated for, but it is a real difficulty.

Mary Scanlon: It is interesting to think about the difference between custom and direction.

As you are aware, the national collections institutions are very concerned that they might lose charitable status under section 7. Could the issue be resolved by exempting those institutions from that section, or could section 65 be amended to counter the restrictions of section 7?

Your submission emphasises that the impact will depend on the exact terms of the constitution. Is there a third possible answer to the problem? For example, would it be possible for the national collections to amend their constitutions to fulfil the criteria and requirements of charitable status?

Jane Ryder: That is possible, but I do not know quite how the amendment would work. That would be a major exercise. If you decided to do that on the spur of the moment you might get not results, but consequences, as Robert McNamara said. There is certainly enormous sympathy for the position of the national collections, and I have to declare an interest because I was previously director of the Scottish Museums Council, which is the organisation that is responsible for all the non-national museums. That is not the national collections, but nevertheless you can see where

my heart is. Along with other witnesses, I think that it would be extraordinary if the national collections were to lose charitable status as a consequence of the bill. I gave additional evidence to the Finance Committee about accepting gifts in lieu, so I think that there are enormous areas where the national collections would suffer. If I can speak for the public's perception, I would think that it would be very much that the national collections should remain charities.

Mary Scanlon: From reading your submission there is a possibility that, although it would take a lot of work, amending the constitutions could be done.

You introduced the word "custom"; we are more used to ministerial directive. The move of Scottish Natural Heritage to Inverness was brought about by two ministerial directives, which is quite unheard of. Are we looking at two different types of public body? SNH may come under closer ministerial directive, but the national collections are based more on customary practice.

12:15

Jane Ryder: Whether the national collections are so distinct and special that it is possible to make a special case for them in the legislation is really a policy decision rather than the regulator's decision. Making a special case for them would cause the regulator no problems because the legislation would be clear.

Mary Scanlon: With your old and your new hats on, have you discussed those issues—which are causing great concern—with representatives of the national collections? Do you see a way forward?

Jane Ryder: I have not discussed them in detail or directly, as it is inappropriate for the regulator to have such discussions with individual charities. Doing so would get one into the area of giving individual advice.

Mary Scanlon: Absolutely.

Mr Home Robertson: We had probably better stay out of the national collections issue for the reasons that have just been given, although I hope that we can make progress on it.

It is clear that the independence of charities is important, and we have got into a rather complex debate. There is the question whether having the power to appoint trustees constitutes doing away with independence—there is a way of addressing that through the number of trustees who are appointed—and there is the issue of the power to tell trustees what to do, or direct them. However, we are now asking whether earmarking funds for a particular objective constitutes direction. Recent discussion has suggested that earmarked funds

from the Executive or local authorities for a particular purpose constitute direction and that earmarking funds is therefore a problem. By the same token, surely all sorts of giving to charities is earmarked. People have given lots of money for relief following the tsunami, which is earmarked money. If we interpret things in such a way, will not the situation become ridiculous?

Jane Ryder: Yes, I agree that it will and that virtually every charity would be excluded. However, the issue of direction relates to the organisation's constitution and not to the funding agreement.

Mr Home Robertson: Okay. So we can focus on that.

Jane Ryder: Yes. I do not want to set too many hares running, but I think that the funding agreement is relevant to section 65, which deals with the duties of trustees. The trustees have a duty to act in the interests of the charity.

Donald Gorrie: I want to pursue that point. Would it be possible to reword section 7(3)(b) in such a way that some loss of total independence by the charity, which may be in the public interest, is acceptable, but that would still prevent the charity from being for the benefit of only a few people or being not in the public interest in that way? That might be oversimplistic, but is rewording that section an avenue worth exploring?

Jane Ryder: It is, if you hope to end up with a given result. I do not think the public benefit is affected, as that test is set out in section 8. I do not think that the two are linked.

Donald Gorrie: Perhaps the two could be linked, so that, as long as charities provided public benefit, section 7(3)(b) would not apply so severely.

Jane Ryder: I do not think that the two sections could be linked because all charities are required to demonstrate public benefit—that is an absolute criterion. I do not see how you could link constitution and public benefit and say that the two could be balanced out if a lesser degree of something were delivered. They are separate issues.

Donald Gorrie: There seems to be a slight element of hypocrisy in emphasising the constitution so much. The organisation's constitution might be okay; how it operates might be totally different, but that would be within the law.

Jane Ryder: I accept that there seems to be an anomaly.

Donald Gorrie: That is how the world works. Thank you very much.

Patrick Harvie: In your submission, you say:

“we understand there are concerns about the distinction between misconduct and mismanagement”,

but that

“it is appropriate that OSCR powers should be directed, as currently framed, against misconduct and (where appropriate) mismanagement”.

Will you expand on some of those issues?

Jane Ryder: We might not have had to address this matter if the 1990 act had not contained the phrase “misconduct and mismanagement”. It is unfortunate that the term misconduct carries connotations of grievous conduct, but if we went back to the phrase “misconduct or mismanagement” some parts of the sector would be concerned that OSCR was seeking to intervene in management matters instead of dealing with governance issues. Such a balance is very difficult to strike. The matter will simply have to be tested out in practice with the appeals panel, or ultimately the courts, telling us whether we are striking the right balance, whether we are stepping too far over the mark or whether we are not going far enough.

Patrick Harvie: Do you share organisations’ concerns about the perception of an accusation of misconduct?

Jane Ryder: I understand those concerns. It all comes back to the question of managing perceptions that we discussed earlier. Key in that respect will be how we communicate with the sector, how we get those messages across and whether we are seen to act fairly, objectively and transparently in practice, not whether we are able to find another phrase for the legislation.

Linda Fabiani: There is more to this matter than simply the question of how the sector is perceived. For example, some poor soul who inadvertently mucks up on the management side might end up the subject of a lead story in local newspapers saying that he was struck off as a trustee because of misconduct. I am worried that, as a result, the local perception would be that that person had been caught with their fingers in the till or had done something really bad. The terminology raises real concerns.

Jane Ryder: I understand that. From the regulator’s perspective, we want the appropriate locus to ensure that we can intervene at an early stage, provide advice and prevent a situation from becoming a case of what might be described as genuine misconduct. That said, we must exercise such powers proportionately, fairly and transparently.

The Convener: That concludes the committee’s questioning. We are very grateful for your attendance this morning.

In a response to Donald Gorrie, you said that you had carried out an exercise with local authorities under the freedom of information legislation. We would find it helpful if you could give us sight of the results of that exercise whenever they become available.

Jane Ryder: I am happy to do so. We have a list of charities with some statistics on the number claiming rates relief.

The Convener: That would give the committee some context and allow us to find out how many charities, including English-based ones, are out there.

Jane Ryder: I am very happy to provide that information. In fact, we have to supply the answer within 20 working days of the request being made, so you should receive that information shortly.

The Convener: Thank you. That concludes this meeting.

Meeting closed at 12:23.

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