

Association of Charity Independent Examiners

Bentley Resource Centre, High Street, Bentley, Doncaster DN5 0AA

Tel: 01302 828338 Fax: 01302 872973

Website: www.acie.org.uk E-mail: policy@acie.org.uk Registered charity no 1077154

COMMENTS SUBMITTED BY THE ASSOCIATION OF CHARITY INDEPENDENT EXAMINERS ON THE DRAFT CHARITY AND TRUSTEE INVESTMENT (SCOTLAND) BILL

10 August 2004

1 BACKGROUND

- 1.1 The Association of Charity Independent Examiners (ACIE) is a UK-wide organisation providing support, advice, training and the possibility of a professional qualification to those who act as independent examiners of charity accounts under the Charities Act 1993 and under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

Under current legislation, independent examiners are able to act for charities up to £100,000 income or expenditure in Scotland, and up to £250,000 income or expenditure in England & Wales (due to increase to £500,000).

In numerical terms, only a small proportion of charities have a sufficient income to require a full audit, and the vast majority of charities are thus eligible to have their accounts independently examined.

- 1.2 ACIE has a significant number of members in Scotland and has provided training in independent examining under Scottish charity law. ACIE's Scottish members are brought together as *ACIE Scotland* which is convened by a Scottish chartered accountant, although administrative support to ACIE members throughout the UK is provided from a single office in Yorkshire.

- 1.3 The Association has over 500 members. Associate Members receive ACIE's support and advice but do not have any professional status. Full Members, who have to demonstrate substantial experience in charity accounting and the duties of independent examiners, are awarded the qualification *MACIE*. ACIE is both a professional body and a charity in its own right seeking to promote the effectiveness of other charities through support to independent examiners.

ACIE members are a mixture of professional accountants with specific expertise in smaller charities, accountancy practitioners within the voluntary sector providing services to other charities (often called "community accountants"), voluntary sector advice workers, and a significant number of people who act as independent examiners on an entirely voluntary basis.

- 1.4 We have a significant number of members who act as independent examiners in the church sector, and we thus have extensive experience of working with religious bodies (both north

and south of the border) as well as conventional registered and recognised charities.

2 GENERAL COMMENTS

Overall we wish to give a warm endorsement to the Charity and Trustee Investment (Scotland) Bill. We believe it will mark a huge step forward in modernising charity law in Scotland. We particularly welcome:

- the establishment of a statutory register of charities in Scotland (clause 4)
- the establishment of OSCR with statutory powers (throughout the Bill)
- the arrangements for the Scottish Charity Appeals Panel (clauses 46 to 48)
- the modernisation of the accounting requirements for Scottish charities (clause 36)
- the proposals for the SCIO (clauses 38-42).

All of these proposals will be extremely valuable for small/medium charities, and we hope that the Bill will be enacted speedily.

Our comments on specific issues below are made in the context of very positive support for the bill as a whole.

3 CHARITABLE PURPOSES (Clause 7)

We welcome the statutory definition of charitable purposes. But we believe that the minor differences of wording between clause 7 and those in clause 2 of the proposed Bill in England and Wales could cause problems. Different that the definition of "charity" for tax purposes in the same UK-wide, the wording should be exactly the same in both Bills. The Scottish courts may, of course, interpret the purposes differently from the courts in England & Wales, but a common starting point will clearly help.

4 ACCOUNTING REQUIREMENTS (Clause 36 and 37)

4.1 Overall we believe clause 36 is well worded, and will facilitate the implementation of an effective charity accounting regime, which can subsequently be updated without the need for primary legislation.

4.2 Whilst we recognise the specific issues in Scotland where there has been such a long period without effective charity regulation, we believe that the regulations made under this section should as soon as possible lead to accounting requirements which are effectively identical to those in England & Wales (E&W) when the E&W Charities Bill becomes law. This is not an argument for standardisation for its own sake, but is strongly supported by our members in Scotland as being in the best interests of enabling Scottish charities to operate effectively, with realistic (but not excessive) financial regulation.

4.3 In particular, we would support the following thresholds (based on the total income or expenditure of the charity). These indicate the *minimum* requirements at each level.

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| Up to £10,000: | Charity must keep proper accounting records and prepare annual accounts which may be in a receipts and payments (R&P) or accruals format. No requirement for independent scrutiny, but the accounts must be approved by the charity stewards collectively (not just by an individual). |
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| £10,000 to £100,000 | As above, but the annual accounts must be subject to independent examination. The selection of a person to act as independent |
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examiner must meet the current definition - *an independent person who is reasonably believed by the charity [stewards] to have the requisite ability and practical experience to carry out a competent examination of the accounts* [Charities Accounts (Scotland) Regulations 1992, reg 8(1)]. The independent examiner should be required to comply with specific directions, similar to those which apply in E&W under s43(7)(b) of the Charities Act 1993. The reporting duties of independent examiners should also be aligned for charities north and south of the border: at present the reporting duties under the Charities Accounts (Scotland) Regulations 1992 differ considerably from those under the Charities (Accounts and Reports) Regulations 1995 in E&W.

£100,000 to £250,000 As above but with a requirement to prepare annual accounts on an accruals basis, complying with the Charities SORP (apart from those aspects of the SORP where smaller charities are exempted). Recommendation for the independent examiner to hold a suitable professional qualification.

£250,000 to £500,000 As above but with a requirement for the independent examiner to hold a relevant professional qualification - the list of qualifications including Full Membership of the Association of Charity Independent Examiners where the member holds a Domain of Competence covering Scottish charities up to the legal limit for independent examination.

Over £500,000 Accounts to be subject to a professional audit (subject to directions to auditors written into the regulations).

4.4 Note: ACIE does *not* support the proposal in the E&W Bill of including an asset test for audit in addition to the income/expenditure threshold - this will only cause confusion - so we would not wish to see an asset test in Scotland.

We believe a system of thresholds on these lines is well understood in the sector, and provides an effective means of proportionate legislation.

4.5 We would further argue that the accounting requirements should apply to *all* Scottish charities, including charitable companies: at present there is considerable confusion with charitable companies being subject to accounting requirements under the Companies Acts which are much less rigorous than those for other charities. In E&W there have been many submissions calling for charitable companies to be subject to the same accounting requirements as non-company charities, and this should apply in Scotland too (especially given that SCIOs will prepare accounts under the requirements of clause 36 - it would be absurd if charities which remain constituted as companies were able to escape this).

4.6 We also support clause 37 of the Bill in providing appropriate sanctions for charities to submit accounts. We would suggest the time limit provided by the regulations and referred to in subsection 37(1) should be the same as for E&W (10 months after year end).

5 REGISTRATION OF CHARITIES (Clauses 3 - 8)

5.1 Although we support the general principles behind the Scottish Charity Register, and we fully endorse the need for a proper register of Scottish charities, we have some practical concerns, particularly in terms of charities also registered in E&W.

- 5.2 We note that there is no provision in the Bill making registration compulsory, unlike E&W where registration becomes compulsory in almost all cases once a charities has more than £5,000 income per year. We appreciate that an organisation which chooses not to apply for registration cannot describe itself as a charity and would not qualify for charitable tax reliefs, but it is still possible that a body could be established with charitable aims and for public benefit, but escape any supervision by OSCR - even though the stewards would in other respects be subject to charity law.
- 5.3 This is particularly problematic in relation to charities registered in England & Wales but operating in Scotland - although they may choose to apply for registration under clause 4 there is nothing in the Bill which requires this. If so, what is the points of allowing for dual registration at all? But if dual registration were made compulsory even for a charity with a very small degree of activity in Scotland this could be very onerous - if compulsion is intended, the Bill most offer a clear definition of what is meant by "operating in Scotland".
- 5.4 This is further complicated by allowing a charity entered on the Register to describe itself (amongst other things) as a "registered charity". A single body could have two separate registered charity numbers - one for its registration with OSCR and one for its registration with the Charity Commission. If this is to be allowed it would cause immense confusion if the term "registered charity number xxxxx" is to be allowed in both cases.
- 5.5 For dual registration to be effective, there needs to be a symmetrical arrangement under which charities established in Scotland but also operating in E&W are also registered with the Charity Commission, but there is no provision for this at present.
- 5.6 A possible alternative to dual registration, would be for the Charity Commission, in its Annual Return procedure with charities registered in E&W, to include a question "Does your charity carry out any activities or fundraising in Scotland". For all charities answering "Yes" to this question the Charity Commission could then provide a periodic extract from their register to pass to OSCR. This could be done within the Charity Commission's existing powers to make regulations for Annual Returns - it does not need new legislation - and it would have the benefit of identifying *all* charities in this position, not just those which chose to register with OSCR. Such a question would seem particularly useful in order for subsection 32(1) in the Bill to work effectively. We would suggest it would be helpful for OSCR to include a similar question about activities in E&W in its own annual return procedures from Scottish charities.

In the longer term, when the review of charity law in Northern Ireland is complete, both OSCR and the Charity Commission may wish to include questions in their annual returns about activities in Northern Ireland - otherwise a charity operating UK-wide might eventually find itself subject to triple registration.

6 TERMINOLOGY OF "CHARITY STEWARDS" (Clauses 50 and 81)

- 6.1 Although we accept the problems of the term "charity trustee" and we can see the attraction of a distinctive term for those involved in the governance of Scottish charities, we feel the term "charity trustee" is well understood by those working with charities in Scotland. It will take a great deal of education for the term "charity steward" to become widely understood.
- 6.2 It will also make it much very difficult for OSCR and the Charity Commission to co-operate in producing guidance literature for charities, given that virtually every publication needs to refer extensively to the roles of charity trustees/stewards. For organisations such

as ourselves providing training for the voluntary sector we will be back in the position of needing different versions of our training materials for different countries of the UK even where the principles are the same.

- 6.3 Also, if dual registration does proceed, it will cause considerable confusion of the same people are known as charity trustees for some purposes and charity stewards for other purposes - similar to all the problems of trustees/directors for charitable companies, which the SCIO seeks to avoid.
- 6.4 On balance, therefore, we would prefer to retain the term "charity trustee" to describe those responsible for governance of charities in any part of the UK.

7 DESIGNATED RELIGIOUS CHARITIES (Clause 53)

- 7.1 We welcome the fact that religious charities are to be brought into effective oversight by OSCR and, for the most part, subject to the same accounting rules as other charities.
- 7.2 However, we have serious reservations about the wide exemptions on Designated Religious Charities (DRCs) conferred by clause 53. We appreciate that principal application of these provisions will be in the Church of Scotland, which has its own accounting rules. But we do not believe such exemptions are particularly helpful: both in terms of financial reporting and accounts scrutiny the Church of Scotland's current rules are less stringent than those applicable to other charities.

Amongst our members we have a significant number who act as independent examiners for churches (north and south of the border) including some who act in the Church of Scotland. Our overall experience is that allowing different accounting rules for churches is not particularly helpful: at best it creates confusion, and at worst it can lead to churches wrongly believing they are outside the ambit of charity law.

We accept that some churches will wish to *add* their own specific regulations to the general framework of charity accounting (this is the position with the Church of England's regulations) - as will other specialised groups of charities. But we do not see a case for exempting a whole class of charities from the normal accounting requirements under the Act.

- 7.3 We are also concerned about the other widespread exceptions from the Bill which are offered to DRCs by subsection 53(5). Why, for example, are people holding unspent convictions for fraud or dishonesty allowed to be stewards for a DRC when they cannot do so for other charities? Why is OSCR denied the power of suspending an unfit steward? Clearly such actions must be handled sensitively by OSCR when working with religious organisations, but similar grounds for special treatment could be raised by other groups of charities working in sensitive areas.

8 MEMBERS OF OSCR (Schedule 1)

The proposal in para 1(2)(e) to exclude any charity steward from being a member of OSCR is extremely restrictive, and will exclude many good candidates. Protocols regarding declarations of interests should be sufficient to ensure transparency.

9 REMUNERATION/BENEFITS TO CHARITY STEWARDS

We are surprised that the Bill is silent on the crucial area of trustees remuneration, where we believe different customs and understandings have arisen in Scotland as compared to

E&W. We believe a clear framework is needed for this. Will OSCR support the Charity Commission's guidance in their publication CC11 *Payments to Charity Trustees* or will they take a different view? Apart from the general principle of public benefit there is little in the Bill to guide them.

Clearly there are charities whose founding documents allow for payments to trustees in certain circumstances, but what is to be the position where no such power exists? To allow for exceptional cases, we would suggest OSCR either needs a power similar to that given to the Charity Commission in s26 of the Charities Act 1993, or a framework is needed similar to that proposed in clauses 27-28 of the Draft Charities Bill in E&W.

We trust these comments are of help, and we repeat our welcome for the Bill as a whole.

Ref: CHBSRESP

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