

These comments broadly follow the pattern of the consultation document with cross-references to clauses in the Draft Bill where appropriate.

1 DEFINITION OF CHARITY

Charitable Purposes s7

You proclaim that you want to have the same definition of charity in Scotland as in England & Wales to avoid the prospect of some Scottish charities being unable to receive charitable tax reliefs and some organisations which cannot be Scottish charities obtaining tax reliefs. Yet you have defined charitable purposes in somewhat different wording from the Home Office draft bill. We think this is a mistake and urge you to re-consider. If there is any difference in wording then the courts will inevitably find a difference in meaning. A careful reading of the Draft Bill reveals that, contrary to the Home Office draft bill, s7(2)(j) and (k) do not allow for the provision of care, except accomodation, to needy people who are not aged, disabled, young or children. We sympathise with the Scottish Executive's desire to produce its own Act honed for Scottish circumstances, but until tax affairs are a devolved matter we urge the Executive to be patient and not to damage Scottish charity to make a point. The public understands that charity and tax reliefs go together.

Public Benefit s7

We strongly support your proposal that the definition of public benefit be the existing definition based on case law. We are entirely opposed to the suggestion that there be a statutory definition or even broad criteria in the legislation. Such a definition, no matter how phrased, would create huge uncertainty and could easily lead to unintended consequences in removing charity status from many existing types of charity. In any case the public benefit test is part of the definition of charity (and this is to be reinforced with the loss of presumed public benefit for poverty, education and religious charities) and any difference here from the England & Wales situation (based on case law) will lead to the very anomalies you are trying to avoid.

A second reason for not having a statutory definition is that it will inevitably reflect the situation today. The result will be a need to have the definition statutorily revised every few years with all the temptations to align "public benefit" with the short-term party political priorities of the day. There could be nothing so potentially destructive as this to the reputation of charity and public confidence.

The Charity Test s7

The Scottish Executive is aware of the considerable amount of charitable work that is delivered in Scotland by charities registered elsewhere, and has said that it intends to minimise the burden of dual regulation for them. We welcome this and suggest that a new clause be inserted at 7(1)(c) stating that a body meets the charity test if it is registered as a charity elsewhere in the UK.

2 ESTABLISHING A STATUTORY CHARITIES REGULATOR

Members of OSCR Schedule 1

We note that in Schedule 1 clause 1(2)(e) no charity steward may be a member of OSCR's board. We think this is a mistake and urge reconsideration. Indeed we would go so far as to suggest that no person should be appointed who has not been a charity steward and preference should be given to candidates who are currently charity stewards. It is important that OSCR's members have a first

class understanding of the realities of running a charity if OSCR is to retain the confidence of the charities it is regulating.

Role of a Charity Regulator s1

We welcome the establishment of OSCR but urge that the Bill includes a specific duty to act fairly, proportionately and with natural justice. You say that you intend regulation to be proportionate. We will be inclined to believe that will be delivered by OSCR if it is on the face of the Bill.

Role of the Minister s3(3)(e) and s6(1)

If the public is to have confidence in charity it must be able to have confidence in the charity regulator. Crucial to this confidence is the independence of OSCR from the Executive and its Ministers. We do not see that the Minister needs powers to decide what information should be on the Register in s3(3)(e) or that the Minister needs to involve himself in the procedures for applying and determining registrations in s6(1). That is the role of OSCR. More generally we urge the Scottish Executive to be questioning of any involvement of the Minister in charity regulation. It is potentially a recipe for serious damage to the reputation of charity.

Support and Advice for Charities s1

We are content that OSCR should be left to develop its advice giving role at its own pace, but surprised to be unable to find in s1(2) any explicit reference to its power to give advice.

Form of the Regulator Schedule 1

We are very concerned at the Ministerial power in Schedule 1 clause 5(2) to fix the terms, conditions and numbers of the employees of OSCR. We recognise that the Executive needs to keep reasonable control of public expenditure but we have observed a serious long-term problem for the Charity Commission in that it has great difficulty in attracting and keeping staff of adequate quality. Surely, if the Minister sets the terms and conditions for OSCR's board members then they can be trusted to decide how many staff they employ, with what duties and on what salaries. Obviously this would have to be subject to overall budgetary control by the Executive.

3 HOW CHARITIES SHOULD BE GOVERNED

Charity Stewards s81

We disagree that charity steward is a better term than charity trustee, or that there is actually a need to change from the widely understood use of trustee. Nor do we agree that there is confusion between charity trustees and other trustees. We urge you to re-think this one and not foist new terms on an unwilling sector when there is no confusion about the term trustee within charities or the public.

Duties of Charity Stewards s50

We support the duties of a charity steward in s50(1)-(3) including the higher duty of care required of professional trustees in s50(1)(c). But we are very opposed to the implications of s50(4)-(6) which appear to turn minor innocent failures into criminal offences with automatic penalties on individual stewards. This is completely wrong and in our opinion may lead to a substantial shortage of stewards if these clauses are implemented. The way to deal with misbehaving stewards should be based on the following principles – able stewards who make innocent mistakes should be assisted to put them right, stewards who are incompetent or uncaring should be removed, and stewards who wilfully misbehave (especially if it involves theft or fraud) should be charged with criminal offences

and brought to court. At the Joint Parliamentary Committee hearings on the England and Wales Draft Charity Bill, the new Chair of the Charity Commission was obliged to admit that the charity law is now so complex (and Scotland is not different in this) that there was probably not a charity in the land which was always compliant and probably not a trustee in the land who knows all the requirements. Asking a steward to have the care and diligence of one who is acting for another is not consistent with demanding zero errors under the threat of criminal sanctions. The latter standard is only achievable if trusteeship was professionalised by law. We urge the Scottish Executive to re-think this aspect of the Draft Bill.

We also urge the Executive to give OSCR and the court the power to relieve a defaulting but well meaning steward of penalty. Otherwise we predict a severe shortage of stewards.

On the subject of the independence of stewards we too believe passionately that this is fundamental to the reputation of charity. We are delighted that the Scottish Executive is showing signs of stopping the abuse of charity which results from the establishment of government "charities". We are disappointed that the Executive has not taken such a robust line towards local authorities and would urge you to review the involvement of local authorities in charities where similar abuses are common.

Disqualification s51

Sections 51(1) and 51(2)(a)(ii) when read with s50(4)-(6) make it clear that any error resulting in a breach of the Act may lead to a steward being convicted and disqualified. Apart from the reference to the Rehabilitation of Offenders Act in s51(3) there is no way that OSCR can make the punishment (disqualification) proportional to the offence. The Charity Commission has perpetrated some quite outrageous injustices by banning for life from all charities trustees who have made minor innocent mistakes. You say in the consultation document that OSCR "will be able to grant a waiver of a disqualification where a convincing case is made". Only for the crime of murder is a person punished indefinitely and for life. We strongly recommend that the Draft Bill be amended so that OSCR must specify how long a disqualification will last and has the power to confine the disqualification to named charities.

4 POWERS TO DEAL WITH WRONG-DOING IN CHARITIES

Reports on Inquiries s29

In s29(4) OSCR is required to send a copy of a report to the subject and publish the report. In our opinion this is insufficient. We have grown used to seeing the Charity Commission publish one-sided reports that say little of significance but try to justify the Commission's actions. We think it essential that any charity, trustee or other party mentioned in a report should be invited to co-sign the report or alternatively add a dissenting appendix to be published with the report.

Powers of Court of Session s30

In 30(4)(c) the court may appoint a judicial factor to manage a charity. We think it important that such factors should be paid for by OSCR. This will remove the temptation for OSCR to casually apply for the appointment of a factor so that it doesn't spend its own money sorting out the problem more quickly with the aid of the charity's stewards. We do not regard this as merely a hypothetical problem but have seen it happening in the Charity Commission.

Expenses s33

We do not disagree with the draft here but consider it would be improved and balanced if the court also had the power to award expenses against OSCR, members of OSCR's Board and employees of OSCR when they abuse their powers and cause excessive costs to a charity or steward.

Appeals Against OSCR Decisions s43-49

We think that the lists of decisions subject to review in s43 and s49 are misguided. We urge that there be substituted a simple statement saying that any decision by OSCR which impacts upon a charity or other organisation, or a steward or other person shall be appealable to the Panel and the Court of Session. This must include decisions made by OSCR to not investigate a charity or body purporting to be a charity after receiving a complaint.

In s47(4) we welcome the fact that the Panel will not award expenses. But it should be made clear that the Panel itself may not charge fees.

In s47 we believe strongly that it should be made clear that the Panel has the power to award compensation to charities, stewards or others who have suffered loss as a result of misbehaviour by OSCR. We have seen too often how the Charity Commission can inflict clumsy or even vindictive regulation on charities and then walk away having cost the charity in some cases tens or hundreds of thousands of pounds. We have no reason to suppose that OSCR will behave differently unless it is obliged to take responsibility for its behaviour. An argument against this is that it could cost OSCR (and the public purse) a lot of money. If that's how they behave so be it. But we suggest that if they are subject to paying compensation they will take care to behave properly and proportionately, a desirable outcome of any legislation about regulators.

In s47 we urge that you add a requirement that the Panel publish its decisions to provide transparency and further the development of charity law.

5 REGULATING CHARITY FUND RAISING

There are organisations far more expert than BTCV in the area of fund raising and we shall make no comment.

Charity Trading

However we are expert on the issues of trading by charities. We are very sorry to see that the Scottish Executive has decided not to widen the scope of trading for charities and allow unlimited non-prime-purpose trading within a charity. You state that larger charities are generally happy with the present system and so we are. We have substantial trading companies which isolate the risk, focus the entrepreneurial spirit and keep the taxman off our back. Small charities such as our local groups have no problems as they generally operate trading below the concessionary tax thresholds. But there is a considerable gap between the concessionary thresholds and the economic scale for running separate trading companies. It is this gap which keeps many medium size charities from being able to fund raise from trading effectively without incurring excessive regulatory costs. This is an artificial barrier to the development of charities.

The specific arguments you put forward are weak.

- ◆ Exposing charities and trustees to the risk of large scale trading is already commonplace, provided the charity's trading serves its prime purpose. Trustees daily demonstrate their ability to manage this risk.

- ◆ Exposing the charity's trading to tax liability is a straightforward business decision any board of trustees can make. It merely requires a little accountancy advice about when it would be sensible to establish a trading company.
- ◆ The Home Office's wish to have a level playing field between charity trading and commercial trading is nothing of the sort. It is a wish to have a level taxation field. Since when did charities expect a level taxation field with the rest of the world?

6 IMPROVING THE OPERATING ENVIRONMENT FOR CHARITIES

Changes Which Require OSCR's Consent s13

In s13(2) we do not see why OSCR's consent is required for charity amalgamations, winding up or dissolving a charity, or applying to the court. Trustees are charged with making the best decisions for their charities and beneficiaries and are generally quite capable of doing so without nanny holding their hand! In the case of applying to the court, we feel strongly that this is wrong in principle. We have seen the Charity Commission obstructing charities' access to the courts to prevent the regulator's behaviour coming under scrutiny. Charities are entitled to the same unfettered access to the courts as any other person or organisation.

Removal from Register: Protection of Assets s16

In 16(5) we question whether a charity receiving property from another charity should be allowed to apply it for its own purposes "as it thinks fit". Surely such property should continue to be subject to any restrictions imposed by the original donor.

Scottish Charitable Incorporated Organisation s38-42

We are content with the proposals in the Draft Bill and please note that we wish to be involved in the further consultation about the SCIO.

7 TRANSITIONAL ARRANGEMENTS FOR EXISTING CHARITIES

We are content with the proposals in the Draft Bill and please note that we wish to be involved in the further consultation about the Draft Regulations.

FURTHER POINTS NOT IN YOUR CONSULTATION DOCUMENT

Costs of Compliance

Whether your estimates of the costs of this legislation to the Scottish Executive are accurate will soon be known. But this is only part of the cost of compliance. Frankly, citizens get fed up with being told by government how jolly efficient the government is when they can see quite easily how government pushes its own costs onto the same citizens. The same goes for charities and we urge the Scottish Executive to require of OSCR that it monitors and publishes the costs to charities and others of its regulation, both statistically and in each charity it investigates.

Public Access to Scottish Charity Register

In s17(1) we suggest the addition of a sub clause requiring the Register to be put on the internet. This will enormously increase the availability of the Register and it's hardly revolutionary in 2004.

Entitlement to be Given Information by Charities s19

In 19(1) we suggest that addition of the annual report of a charity should be available by right. There is increasing pressure for charities to make themselves accountable through the annual report and this won't be meaningful without a right of access to it.

Also in 19(1) we question the words "if the request is reasonable". We cannot think of any circumstances in which the request would not be reasonable and experience in England and Wales is that persuading some charities to supply these documents as required under the Charities Act 1993 is hard work. This wording gives charities an excuse to pronounce every request unreasonable.

In the same sentence the words "in such form as the person may reasonably request" puts the boot on the other foot. This is a charter for demands for large print or braille versions, or electronic versions in particular formats. If charities' constitutions, annual reports and accounts are available in forms which meet general law that should be sufficient.

We challenge the propriety of s19(2) whereby the Minister may exempt some charities from supplying this information. We cannot think of any circumstances in which members of the public should not have access to such basic information about a charity. If they are a charitable company then company law already puts this information in the public domain, even if not from the charity.

Accounts s36

In 36(4) the Minister may regulate to details of accounts kept by charities. As drafted it holds the prospect of charities registered elsewhere than in Scotland having to produce additional financial data over and above that already required. This runs completely counter to the stated intent to minimise dual regulation requirements on UK-wide charities. We suggest that this clause be confined to Scottish Charities.

Failure to Provide Statement of Account s37

Regarding s37(4) there are plenty of reasons why charities may be a little late in producing their accounts, especially in small charities with no staff. The proposal that stewards be personally liable to pay the expenses of an accountant foisted on them by OSCAR is outrageous. Perhaps both stewards died and there are new ones trying to sort out an inherited problem! A sliding scale for a small, automatic fine on the charity will be effective in nearly all cases. This should be proportional to the degree of lateness and the size of the charity. There should be scope for exemption by OSCAR where the difficulty is reasonable. The few cases remaining may warrant removal of incompetent or unwilling stewards. Either way, fines on trustees are the wrong solution. In any case the attempt to make stewards of incorporated charities personally liable lifts the corporate veil in a way that makes incorporation much less attractive and is, we suggest, a bad principle in law.

Designated Religious Charities s53

We are sorry to see that the Executive is proposing to continue exempting certain religious charities from the charity regulator. We view this as merely special pleading to avoid the rigour of charity law which undermines the reputation of charity generally. If the churches are compliant with charity law they have nothing to fear. If they are not then they should be subject to OSCAR or cease to be charities.

Offences by Bodies Corporate etc s77

As in s37 above s77(1)(a) has the effect of partly lifting the corporate veil by holding stewards/directors personally responsible, which we believe is bad in law and practical result. It is

also another example where criminal sanctions are proposed when civil ones would be appropriate. We believe that criminal sanctions should only apply in cases of deliberate wrongdoing such as fraud or theft, and we urge you to re-think this.

Ancillary Provision s78

Orders, Regulations and Rules: General s79

We are concerned that these provisions to allow the Minister to amend this Act through statutory instrument are extraordinarily wide. Are the writers of this Bill unsure of their ability to get it right or has the Minister suggested she wants to keep control of charities through the back door? The proper place for charity legislation is in the Scottish Executive. We urge the Executive to re-consider these sections and draw them very tightly.

General Interpretation s81

The definition of “charity” suggests that the word is to be statutorily confined in Scotland to bodies registered with OSCR. It may be a good idea that such bodies have a unique and protected description, but trying to corner the market in a word which has been an everyday part of our language for centuries will be widely misunderstood, resented and ignored. There are good public safety reasons why words like “architect” and “medical doctor” are protected – their protection protects the public. It would be difficult to argue that for “charity”, and shanghaiing its use will be rightly very unpopular. Would the compulsory use on stationery of some phrase such as “a charity registered with OSCR in Scotland Number 12345” serve the purpose?

The word “community” (used in The Charity Test s7(2)(m)) is not defined and should be if you persist in using it.

END