

Draft Charities and Trustee Investments (Scotland) Bill24th August 20041. Opening

Ayr Housing Aid Centre is a local Housing Advice, Information, Advocacy and support service operating in South Ayrshire. We have a charity number with the Inland Revenue and are on the Charities index established by the Office of the Scottish Charity Regulator. The Centre is governed by a Management Committee consisting of laypersons and representation from our main financial supporter's. The Co-ordinator (a employee of the Centre) for the Centre prepare and circulated a report to the Committee on the consultation and from this our response was developed. We welcome the opportunity of responding to this consultation and broadly support the modernisation of charities provision and the introduction of a single regulator. This response will seek to identify relevant issue's and will identify chapters and page numbers in relation to our comments.

2. DetailA vision for a flourishing charities sector (Chapter 2 pages 4 -7)

Scotland deserves a properly regulated and support charity sector is the broad statement made on page 4. As a small local charity we do not have a problem with this broad aim and indeed welcome it. The regulations being put in place is designed to support and encourage charitable activity in Scotland and we recognise this. The Office of the Scottish Charities Regulator (OSCR) has been established to monitor and supervise charities in the run up to legal reforms. We as an organisation have already been in contact with OSCR. The starting point is to welcome a dedicated single regulator for charities in Scotland. We fully agree with the sentiments in page 4 in terms of a smooth transition towards the new legal and regulatory framework. It is vital that the regulatory pressures on charities should be proportionate to their purpose, size and resources. One would hope for example if a particular charity is already meeting the requirements of regulation in an area this could be pass-ported into other regulatory requirements. This is about a joint up system of regulation and could serve to minimise the burden on charities whiles not detracting from the overall aim. An example of this is a charity registered with the Care Commission and/or working within the National Standards in Housing Information and Advice.

The vision for charity regulation set out on page 6 and it has five key principles, it must be; Independent, Proportionate, Accountable, Transparent, Consistent, we welcome this.

The draft bill is seeking to create charity regulation, which recognises the needs for the sector and the public interest. We fully support this aim, indeed without public confidence the sector and beneficiaries would suffer. The context for proportionality set out in page 7 is very important. It highlights that different charities may be required to provide different levels of proof in terms of compliance with the regulations. This will be set out in more detail in secondary legislation.

We welcome the commitment that charities on lower incomes will be subjected to less stringent information requirements than larger charities. One hopes that the secondary regulation itself will not over burden the sector. The definition of smaller charities will be important in terms of the commitment to proportionality and financial turnover should not be the sole factor. The geographical operations of a charity could be a factor. The requirement of consistency has equal importance and this must be reflected in the regulatory operations of OSCR, any secondary legislation and guidance issued.

Key issues for the reform of Scottish Charities Law

i. Definition of charity (sections 6-7)

The Inland Revenue recognises this definition and the term charitable purpose has four heads;

- Relief of poverty
- Advancement of education
- Advancement of religion
- Other purposes beneficial to the community

The Mcfadden Commission states that a Scottish Charity should be an organisation;

- Whose overriding purpose is for public benefit
- Which is non-profit distributing
- Which is independent
- Which is non-party political

There appears not to be a particular problem with heads two and four but one and three could be difficult, for example in partnership working and direct service provision.

ii. Charitable Purpose (section 7) see page 9

The definition of charitable purpose is extremely important in many contexts. It must fit into a Scottish context one which the Scottish public will understand. At the same time it must also fit into the relevant UK tax legislation that offers relief for charities. For an organisation to be a charity is must at least come under one of the 13 headings and it must be of public benefit. The listing of categories which may meet the definition of charitable purpose is useful for current Charities and others considering whether to seek charitable status, we welcome the list.

iii. Public Benefit (sections 7 & 8) see page 9 & 10

The concept of public benefit is central to the existence of a charity. Clearly is must be benefiting the public or a disadvantaged group within society. We note the concern about the potential that this concept should be flexible while others felt that this should be defined within the bill. We welcome that the bill will not define public benefit; OSCR will publish guidance setting out how it will interpret public benefit in deciding whether an organisation meets the

charities test. There is an existing right of appeal to the Courts if an organisation is in dispute on the point with the OSCR and prior to this the internal and external appeals process will be open to the aggrieved.

The concept of public benefit has developed over the centuries and indeed the modernisation of the concept has kept pace with public aspirations and priorities over the years. The imposition of a statutory definition would only serve to undermine this mechanism. In practical terms it is important that guidance is given on public benefit to allow existing organisation and ones of the future to assess whether they fall or could fall under the definition of a charity. We broadly support the proposed criteria outline in page 10 but would also caution that it could suffer the same effect of a statutory definition if insufficient guidance is given. This criteria could be the foundation for guidance and be given some level of statutory force in terms of the OSCR must have regard to the guidance, similar to guidance given in terms of homelessness. It is arguable that the guidance on this vital element should come from the law makers rather than the regulator.

iv. Establishing a statutory charities regulator in Scotland, see page 11

Currently in Scotland there is no single registrar or regulator body for Scottish charities. OSCR is currently able to seek charities accounts and reports, and to investigate whether charities are complying with existing law. The bill seeks to expand the role of OSCR. We welcome OSCR and hope this will bring clarity to the sector.

Role of a charity regulator (sections 1 – 6) see pages 12 – 16

The bill provides for the establishment of the Office of the Scottish Charity Regulator (OSCR) as an independent statutory body. Its role will be to regulate charities proportionately and transparently in the public interest. They shall maintain a public accessible register of all bodies eligible to operate as charities in Scotland. All bodies wishing to operate, as a charity in Scotland must register with OSCR providing contact details and any other information required by OSCR, any changes and whether they have ceased to exist. This is the basic building blocks of the regulator and the role of organisations. If an organisation meets the definition of a charity then OSCR must register them. It is also the intention that local authority legislation be amended to ensure that all registered charities has mandatory local rates relief. It is also expected that all registered charities will have access to UK tax relief.

OSCR shall keep the register under review and have the powers to remove a charity from the register if they no longer fit the definition or has ceased to exist. A body on the register will be able to describe themselves as;

- A Charity
- A Registered Charity
- A Charity Registered in Scotland

We welcome all of this and what is important to the sector is how they will carry out their duties and functions.

Support and Advice for Charities

McFadden Commission suggested that in terms of OSCR that they should have in addition to the regulatory role an advisory role. There have been concerns expressed over potential tensions between the roles. The bill will establish this dual role although the principal role is as a regulator. We do not see a particular problem in the dual role and indeed good advice to the sector will encourage good practice and compliance with the regulations and the law. Currently the Care Commission provides a similar role in terms of regulation and advice.

Form of regulator (section 1 & 2 and schedule 1)

In consider the statutory form for OSCR the Executive felt the most important characteristics are;

- Independence from government
- Independence from the charities sector
- Ability to contribute to Executive policy-making for the sector
- Accountability (to its funding body)
- Accountability (to the public and to stakeholders)
- Governance structure represents a range of skills, interests and backgrounds
- Decisions can be appealed cheaply and easily

The Executive has decided that OSCR should become a Non-Ministerial Department. Many within the sector consider that this option will not give OSCR the necessary independence from government. We do not have any direct concerns with the form OSCR takes, it how it fulfils its function that will be important to charities.

Accountability of OSCR will be on a number of levels including the Scottish Parliament, Audit by the Auditor General it will publish annual reports and accounts, publish corporate plans hold meetings and consultation and have an accessible website. In terms of the form OSCR will take We think it is important that they are also accountable to the sector and this should be included in legislation.

How Charities should be governed (page 16)

The role of charities boards and management committees are vital to the function of the sector. McFadden commission considered that “ the public is entitled to some reassurance that organisations calling themselves Scottish Charities are managed properly.” They further felt that this should be part of the criteria for registration as a charity. The role and responsibilities for volunteers, board and committee members are very important and needs to be clear. The bill will set out clearly and explicitly the responsibilities of those involved in running charities. In terms of the regulatory framework this is important, scale of operation must be a factor.

Charity stewards (section 81) page 17

There has not been a legal term for a member of a charity board; this section introduces the charity steward. The definition of this terms covers, any person voluntarily governing a charity or sitting on a charity board. We do not have any problems with this title

Duties of charity stewards (section 50) page 17-18

Charity stewards will be under a duty to always act in the best interests of the charity and ensure it follows its charitable purposes. The same care and diligence that a person of ordinary prudence would use in managing. Any steward who acts in the course of their business or profession should use any special knowledge or expertise that it is reasonable to expect of a member of that profession or business. OSCAR will have a duty to investigate any charity where it suspects a steward is not complying with there duties. A breach of the duties will be an offence and could lead to action by OSCAR. The executive appears to be clear in terms that the key issue is not how charity board members are appointed but how they act once they have been appointed. There is an important principal in terms of charities independence on this issue, this must be safeguarded. Having said this, we consider that the broad duties outline is in line with a commitment to charities. It allows a focus on the overall purpose of board or management committee members.

Disqualification (section 51-52) page 18

These sections set out the types of people who will not be allowed to be charity stewards, it will be an offence for a disqualified person to be a charity steward. There is no sanction against charities that inadvertently appoint a disqualified person and there actions shall remain valid. Charities will probably have to develop a Committee member statement, which confirms that the steward is not disqualified from serving.

Powers to deal with wrongdoing in charities

OSCAR will have adequate powers to investigate complaints, monitor compliance with the law and to deal with wrongdoing. Currently they have powers and these are to be extended by this bill. In serious cases Ministers can take serious cases through the civil courts. The Court of Session can safeguard the assets of a charity, remove trustees, freeze assets and appoint judicial factors to manage the charity.

The current system has worked reasonably; the new extended system should allow greater speed in protecting charities assets. It is envisaged that it will be clearer and there will be a free, accessible appeals process. OSCAR powers to act will be time limited at not extend beyond 6 months, further action beyond this will have to be agreed by the Court. We note that actions taken by OSCAR will not always be for example suspension it could give directions to deal with issues. The support role of OSCAR could assist charities in dealing with problems within the organisation and encourage good practice in the sector. The culture should in most cases have the primary aim of resolution of problems prior to any directions or sanctions.

Supervision of Charities (sections 24-33) pages 19-20

OSCR will have powers to make inquiries regarding any charity or organisation calling itself a charity. They will have powers to demand relevant information from any person or body for the purpose of the investigation within a specific time period. It is obvious for the new system to work there must be cooperation between charities and the regulatory body. Once again requests from the regulator must be proportionate to the size of the organisation.

Appeals against OSCR decisions (sections 43-49 and schedule 2) page 22

Currently a charity aggrieved by a decision of OSCR can only challenge its decisions or actions through the court. The bill allows for an internal appeals system against decisions. The actual detail of the system will be developed by OSCR and will be free. If the charity disagrees with the conclusion of the internal appeal they can refer it to an external panel. This panel will have three independent members appointed by the Scottish Minister and will sit on an ad hoc basis. This panel can dismiss the appeal, refer the case back to OSCR with a direction with which it must comply or remit it to OSCR for reconsideration. Regulations will deal with the detailed procedure and rules for the panel; it will be possible to appeal decisions to the court. We welcome this but hope that representation from the sector could be part of the independent panel.

Regulating Charity Fundraising

The Government has stated that it has no interest increasing red tape in terms of charities fundraising. However it is important that public trust in charities is promoted, clearer regulation could facilitate this. The bill sets out important foundation of statutory fundraising for charities. The bill will allow a self-regulation scheme time to prove its worth backed with fundamentals for transparent charity fundraising. We welcome that there is no intention to increase red tape but we do recognise there is a balance between this and public trust.

General Fundraising Powers (section 60-62) pages 24-25

This power covers fundraising for “benevolent bodies” which is a wider concept than charities. A charity or a benevolent body will have the right to seek an interdict preventing an unauthorised body from raising funds in its name. In addition it will be an offence to solicit money or property by a body that suggested it is a charity.

Fundraising by Professional Fundraisers and Commercial Participators (sections 61-62) page 25

The bill will provide powers through secondary legislation for what the content or format of contracts between the charity and the professional fundraisers. They will be a requirement to make statements to potential donors the amount they will receive and about how much the charity will receive, we agree with this..

Self-regulation and its effectiveness (section 64) page 25

The model of self-regulation will be for the sector to decide and the implementation of the same will be for the sector. The bill will have reserved powers to introduce a regulation scheme if there is no confidence in self-regulation. It is suggested that different models could apply to different methods of fundraising or different classes of organisations. Regulations could include that organisation that fundraise must follow a code of practice; this could be achieved by a kite mark system. Failure to comply with regulations would be an offence. Any regulatory scheme whether self or mandatory must take into account scale of operations. A worry that we have is the scheme would be greatly influenced by the larger charities and fundraising organisations to the potential detriment of smaller charities. We note that the bill recognises the potential disproportionate effect that regulation can have on smaller charities, this principal must also apply to any self-regulatory or mandatory scheme in terms of fundraising.

Public benevolent collections (sections 65-71) pages 26-27

The Executive broad objective is to continue the current system with Local Authorities taking the lead in licensing collections. Such collections will be called Public benevolent collections. (PBC's) The bill seeks to introduce some improvements to this. The definition of PBC's includes the collection of money and promises of money from the public in a public place. This will now cover requests for direct debit donations in public places that were not in the past regulated. A public place will be a place in which the public has unrestricted access when it is opened. It should be may clear in the legislation what is covered by PBC's and what is not. In general terms we would support greater clarity in terms of this type of fundraising.

Improving the operating environment of charities

Under current charity law it is difficult for charities to change its constitution, merge or wind up. The bill seeks to create a simpler and cheaper process for charities to change. OSCR will be able to access dormant charity accounts and redistribute funds. It will modernise accounting framework for charities, it will widen trustees powers of investment and create a new legal form- the Scottish Charitable Incorporated Organisation.

Making charity re-organisation easier

A charity wishing to change its name must notify OSCR. (section 10)

Charities with the power to change own constitution (sections 13-14) page 28

Charities intending to change their constitution must notify their intention to OSCR; this also applies to merger or winding up. In addition the law preventing a change from charitable to non-charitable status will be repealed, consent from OSCR will be required. We welcome the simplification of these processes.

Framework for Accounting and Reporting (sections 36-37) page 30

Regulations will prescribe the form of accounts and thresholds according to which different requirements will apply to different size charities. The bill also provides for the independent audit and examination. It is intended that the regulations will adhere to; Accounting Standards Board Statement of Recommended Practice for Charities, which is currently being revised. Under current charity law and accountancy the size and income of the charity are relevant to our financial reporting requirements. It is important that accounting requirements do not put disproportionate burdens on small charities.

Scottish Charitable Incorporated Organisation (SCIO) sections 38-42)

This will be a new legal entity and will allow charities to become corporate bodies with limited liability to members and stewards, similar to companies limited by guarantee. Another option is for SCIO's to take a form in which members and stewards have no liability for debts.

Transitional arrangements for existing charities

All existing recognised Scottish charities will be transferred onto the Scottish Charities register. Regulations will set appropriate transitional arrangements to allow existing charities time to comply with the new procedures and regulations. OSCR will have an important role to play in support of the sector.

Compliance costs

There will be some additional costs for charities under the regulatory framework. There will be requirement to respond to request from OSCR and the need to follow revised accounting standards. There is a commitment to keep compliance costs to a minimum. The starting point must be the need to recognise that scale of operation should be a factor in terms of reporting and accountancy requirement, these should not over burden the sector in particular small charities. This in turn will serve to minimise the financial burden on small charities. Any regime introduce should of course ensure that small charities are operating properly in all respect to enhance public confidence.

Enforcement and Sanctions

The bill and consultation paper proposes a number of criminal offences and if convicted will result in a fine ranging from level 3–5. Organisations that represent themselves as charities who are not registered with the regulator could be fined. Charity stewards who breach their duties could be fined, this fine would not be levied against the charity. OSCR will be able to take civil action against charities who they believe to be engaging in misconduct. They will have powers to investigate, take direct action to suspend charity stewards, freeze assets or direct charities to stop particular activities. It would have been pointless to have a regulator system without enforcement and sanctions. There is an internal and external appeals system for

disputes between charities and the regulator and failing which there is the courts. We would refer to comment on page 5 of our response regarding resolution of problems.

Conclusion

This bill hopefully will re-establish confidence in the charity sector. The establishment of a single regulatory system for charities in Scotland hopefully will allow consistency. In our view we welcome and look forward to working within the modernised system. In terms of detail if the aims of the regulatory framework are met then small charities needs, resources and capacity will be recognised in the regulations, procedures and guidance.

Ayr Housing Aid Centre
24th August 2004