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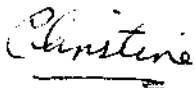
Dear Myra

**Consultation on the draft Charities and Trustee Investment (Scotland) Bill**

Margaret Curran sent me a copy of the draft Charities and Trustee Investment (Scotland) Bill, together with the consultation paper.

I understand that comments should be sent to you and I am therefore enclosing my response, together with the resposdee information form.

Yours sincerely,



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### **Draft Charities and Trustee Investment (Scotland) Bill and Consultation Paper**

I am very pleased that we at last have a draft Bill which brings together for the first time the various legal requirements for charities in Scotland. This is something I have long argued for, both in my former position as Director of Dundee University's Charity Law Research Unit and in my subsequent freelance work.

#### **OSCR**

I welcome the first provision in the draft Bill (in Chapter 1 of Part 1) for the establishment of the Office of the Scottish Charity Regulator (OSCR) with the general functions described in section 1, namely

- (a) to keep a public register of charities;
- (b) to encourage and facilitate compliance by charities with the provisions of the Act;
- (c) to identify and investigate apparent misconduct in the administration of charities and to take remedial or protective action in relation to such misconduct.

OSCR already exists as part of the Scottish Executive Development Department, having been set up under existing legislation (the Scotland Act 1998), and I welcome the proposal that OSCR should be established as an independent statutory public body with enhanced powers. As one of those who have expressed concerns about the combination of regulatory and advisory roles within one organisation, I am pleased that both the draft Bill and accompanying Consultation Paper appear to restrict the advice which OSCR will give to matters concerning how best to comply with the legislation.

In their response to the report of the Scottish Charity Law Review Commission ("the McFadden report") the Scottish Ministers took the view that the regulator's role in advice must be circumscribed, acknowledging that otherwise there would be a real risk that standards would be subverted and enforcement weakened: "The regulator cannot and should not be a 'friend' to the sector, in any sense that might give rise to collusion to avoid regulation".<sup>1</sup> The present Consultation Paper takes the view that while there is a distinction to be drawn between the regulatory and advisory roles it is

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<sup>1</sup> Scottish Executive Justice Department, *Charity Regulation in Scotland. The Scottish Executive's response to the report of the Scottish Charity Law Review Commission.*, Edinburgh 2002, para. 57.

neither practicable nor desirable to set it out in legislation. OSCR is expected to interpret the principles set out in the Bill in a flexible manner as the charity sector develops. I agree with this approach and as long as OSCR continues to work with the sector regarding the provision of advice and promotion of good practice I am hopeful that any potential conflict of roles can be avoided.

The jurisdiction of OSCR is not defined in the Bill, although section 1 (3) states that “OSCR may do anything (whether in Scotland or elsewhere) which is calculated to facilitate, or is conducive or incidental to, the performance of its functions.” I should welcome further clarification on this.

**I agree with the establishment of OSCR as an independent statutory body and broadly agree with the increased powers envisaged. I am hopeful that any potential conflict between regulatory and advisory roles can be avoided. I should welcome further clarification on the jurisdiction of OSCR.**

I note that it is now proposed that OSCR will have responsibility for determining whether or not applicants meet the “charity test” and will register organisations as charities if they meet this test. In its response to the McFadden report the Scottish Executive appeared to reject the recommendation that the new body should be responsible for determining charitable status, taking the view that the Inland Revenue should retain this power.<sup>2</sup> The reason given was to preserve the parity between the definition of a Scottish charity and the Inland Revenue’s definition of “charitable for tax purposes”. The draft Bill states that it is “expected” that charities registered by OSCR will also have access to UK tax reliefs through the Inland Revenue.

There is, of course, no guarantee that this will be the case. There are a number of organisations which would generally be considered to be of public benefit which do not currently qualify for tax relief, and *vice versa* some which qualify for tax relief which many do not consider to be of benefit to the public. While I welcome the separation of the registration and supervision of public benefit bodies from the granting of tax reliefs, the use of the term “charity” or “Scottish charity” will lead to confusion - at least initially - if organisations registered as Scottish charities prove ineligible for tax relief (and *vice versa*). I should have preferred the use of the term “public benefit organisation”. However, I recognise that “charity” is the term most familiar to the general public. Organisations registered by OSCR as Scottish charities would be able to benefit from the public goodwill generally accorded to charities, would have the security of regulation by OSCR, and would have access to additional sources of funding, even if denied tax reliefs.

**I welcome the separation of charity registration and supervision from the granting of tax reliefs. Although I realise that there could be some initial confusion if organisations qualify for one and not the other, my view is that this measure will benefit Scottish charities.**

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<sup>2</sup> Scottish Executive Justice Department, *op. cit.*, para. 32.

## THE CHARITY TEST

While the draft Bill seeks to address the specific needs of the Scottish charity sector, it also seeks to ensure that its proposals complement those being put forward in England and Wales where it makes sense to do so. The question of the definition of charity in relation to an organisation's tax status, "charitable for tax purposes", is specifically mentioned in this context.

The subject of the definition of charity has been hotly debated throughout the UK for many years, and there has long been an eagerness in Scotland to replace the present "four heads" of charity with a more modern definition. However, as noted above, the definition of charity has implications for the tax reliefs which charities receive from the Inland Revenue. As a UK department, the Inland Revenue is obliged to follow the same definition for tax purposes across the UK and the Scottish Executive therefore decided that the Scottish definition should be compatible with the Home Office's proposals in England and Wales. I was puzzled, therefore, to note some differences in the list of charitable purposes in the two draft Bills.

The charitable purposes set out in section 7(2) of the draft Scottish Bill are as follows:

- (a) the prevention or relief of poverty,
- (b) the advancement of education,
- (c) the advancement of religion,
- (d) the advancement of health,
- (e) the advancement of civic responsibility or community development,
- (f) the advancement of the arts, heritage, culture or science,
- (g) the advancement of amateur sport,
- (h) the advancement of human rights, conflict resolution or reconciliation,
- (i) the advancement of environmental protection or improvement,
- (j) the provision of accommodation to those in need of it by reason of age, ill-health, disability, financial hardship or other disadvantage,
- (k) the provision of care to the aged, people with a disability, young people or children,
- (l) the advancement of animal welfare, and
- (m) any other purpose intended to provide community benefit.

The proposed charitable purposes in the Scottish Bill differ in several respects from those in the draft Bill for England and Wales, where category (e) has the term "citizenship" instead of "civic responsibility", and category (f) omits "culture" (although "culture" was included in the list proposed by the Strategy Unit in its report *Private Action, Public Benefit* in 2002<sup>3</sup>). Also, instead of categories (j) and (k), the draft Bill for England and Wales has a single category (j) "the relief of those in need, by reason of youth, age, ill-health, disability, financial hardship or other disadvantage". The final category is also different. While the Scottish Bill refers to "any other purpose intended to provide community benefit", the Bill for England and Wales makes reference to "any purposes not within paragraphs (a) to (k) of

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<sup>3</sup> Strategy Unit, *Private Action, Public Benefit*, Cabinet Office, London, 2002, p.39, Box 4:2.

subsection (2) but recognised as charitable purposes under existing charity law”.<sup>4</sup> In other words, the Bill for England and Wales includes charities which meet the current definition while the Scottish Bill does not explicitly do so. The Strategy Unit report *Private Action, Public Benefit*’s list of categories (subsequently augmented) has as its final category “other purposes of benefit to the community”,<sup>5</sup> which closely resembles the term used in the Scottish Bill. However, while the Strategy Unit report and subsequent Charities Bill for England and Wales make it clear that existing charitable purposes which do not fit into any of the categories listed are meant to be included, the Scottish Bill does not. This could prove to be a significant difference and may lead to a divergence in interpretation north and south of the border, particularly as there may well be a greater inclination on the part of the Charity Commissioners to preserve the existing meaning of charitable purposes as developed by English case law.

The Consultation Paper does not give the reasons for preferring the different wording of categories (e), (f), (j) (k) and (m), but does recognise that with two different parliamentary processes for the two Bills and with different charity regulators interpreting the definition, it is possible that decisions on charity status may diverge over time. I welcome the powers described in Chapter 4 for OSCR to make enquiries about charities and to take action if a charity no longer meets the charity test.

In addition to having to have purposes which consist of one or more of the charitable purposes listed in section 7(2) there is also a second stage “public benefit” test. The presumption of public benefit which currently exists for certain of the four “heads” of charity is to be removed, and in order to meet the charity test the body must provide public benefit in Scotland or elsewhere. I agree with this approach.

The Consultation Paper expands at some length upon the important concept of public benefit, which for the first time will have to be shown by *all* applicants for charitable status. I note that stakeholders consulted during the drafting process were divided about whether “public benefit” should be defined in the Bill and that the Home Office is not proposing to define public benefit in the Bill for England and Wales, leaving it to the Charity Commission for England and Wales to develop and apply its own test of public benefit based on case law and to review charities whose credentials it considers problematic.

One of the issues on which consultees are asked to comment is whether the interpretation of “public benefit” should be left to the regulator or whether broad criteria should be provided in the Bill. In view of the new criteria for charity registration and the fact that the registration of charities in Scotland will for the first time be the responsibility of the Scottish regulator, OSCR, I feel it would be helpful if broad criteria were to be provided. Scottish public trust law would, in my view, be the most helpful source for a broad definition of public benefit. There is no reason why criteria so derived should, as the Scottish Executive fears, limit the ability of

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<sup>4</sup> Draft Charities Bill for England and Wales, s.2(4)(a).

<sup>5</sup> Strategy Unit, *op.cit.*, p. 38, para. 4.13.

OSCR and the Scottish Courts to adjust the definition to meet the requirements of particular circumstances and changes in the sector and in society.<sup>6</sup>

**Unless there is some good reason for the divergence in the lists of charitable purposes which appear in the draft Bills north and south of the border I suggest that the Scottish Executive and the Home Office agree upon an identical list. I can understand, however, the reluctance to include in the Scottish Bill a specific reference to charitable purposes not included in the list but recognised under existing charity law.**

**As far as public benefit is concerned, the test of public benefit has been used for many years by the Scottish courts in trust law. This would seem to be an appropriate source for broad criteria which might usefully be included in the Scottish Bill.**

#### THE REGISTER

The proposed Scottish Charity Register, dealt with principally in Chapter 2 of the draft Bill, places an obligation on OSCR to maintain a publicly available register of charities to be known as the Scottish Charity Register. I note that this register will include all bodies eligible *to operate* as charities in Scotland [emphasis added] which means that charities registered in England and Wales, Northern Ireland or elsewhere which also operate in Scotland will need to register with OSCR. While recognising that such charities will be subject to more than one regulator, the Scottish Executive considers it very important for the public to know that any charity operating in Scotland is subject to the requirements of Scots Law. I agree with this provision, which will particularly useful for the regulation of charities fundraising in Scotland.

In practice, there is an expectation that information technology and the sharing of information between regulators will mean that charities should not be unduly overburdened by the requirement to register in two places and to comply with two regulatory processes. OSCR is already holding meetings with other regulators such as the Charity Commission and Companies House and I accept the assurance on page 13 of the Consultation Paper that OSCR will take a proportionate approach to information requirements for charities with more than one regulator and will only take action regarding their Scottish activities.

Under the terms of section 17 (Chapter 3) of the draft Bill OSCR must make the register available for public inspection

- (a) at all reasonable times at its principle office,
- (b) at such other places as it thinks fit, and
- (c) otherwise as it thinks fit

I assume that (c) will include internet access. I note that OSCR may charge a fee (not exceeding the cost of supply) for providing the information on the register. The kind

<sup>6</sup> See Patrick J. Ford, "Public Benefit Versus Charity: A Scottish Perspective", in Charles Mitchell and Susan R Moody (eds.), *Foundations of Charity*, Hart Publishing, Oxford, 2000, pp. 205-248.

of information which will appear on the register seems appropriate, and I welcome the provision that charities, once registered, must notify OSCR of various changes such as amendments to their constitution and any change in their principal office or other details in their entry in the register.

It would also be useful to have a register of persons who have been removed by the courts from positions of management or control of a charity.

**I am very much in favour of the register, assume that it will be available on the internet and welcome the provision to include all charities operating in Scotland, which will be particularly useful for the regulation of charity fundraising in Scotland. The kind of information to be included on the register seems appropriate and I welcome the provision obliging charities to notify OSCR of changes to their entry. I would also welcome a register of those who have been removed by the courts from the management or control of a charity.**

#### **CHARITY STEWARDS**

Views are specifically sought on the suggested term “charity steward” as defined in section 81 of the draft Bill and on the duties for charity stewards described in section 50 of the draft Bill and in pages 17-18 of the Consultation Paper. The term “charity stewards” replaces the terminology “persons concerned in the management or control” of a charity used in the current Scottish legislation - the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 - which has attracted a certain amount of criticism. The Consultation Paper explains (on page 17) that the term “charity steward” is preferred to the term “charity trustee”, which is used in England and Wales, because “trustee” is specifically associated with trust law in Scotland. A “charity steward” is used to mean any person voluntarily governing a charity or sitting on a charity board. I am in favour of the term “charity steward” in preference to “charity trustee” for the reasons given in the Consultation Paper.

As for the duties of charity stewards, I wonder whether it is necessary or desirable to include in section 50(1)(c) of the draft Bill the provision that a charity steward must “where exercising functions as a charity steward in the course of a business or profession, use any special knowledge and expertise that it is reasonable to expect of a person acting in the course of that business or profession”. I feel that the same general duties should apply to all charity stewards and would have thought that the principles which section 50(1)(c) seeks to address are covered by the other provisions in section 50 and by the professional standards governing anyone acting in such a capacity.

I note that under the terms of Schedule 1 of the draft Bill charity stewards are among the categories of people prohibited from being members of OSCR and wonder what led to this decision. Surely this will exclude a large number of people who would be useful members of OSCR?

**I am in favour of the term “charity steward”. I think it appropriate for Scottish charities and certainly preferable to “charity trustee” because of the specific**

association of that term in Scotland with a trust rather than other legal forms which charities might adopt. The duties allocated to charity stewards also seem appropriate, but I am against including a provision for a particular category of charity steward as in s.50(1)(c).

I am unclear as to why, under the terms of Schedule 1 of the draft Bill, charity stewards are among the categories of people prohibited from being members of OSCR.

#### PROVISION OF INFORMATION BY SCOTTISH CHARITIES

As far as supplying information to other parties is concerned, section 19(1) of the draft Bill provides that a person who requests a charity to provide a copy of its constitution and/or latest statement of accounts is, if the request is reasonable, entitled to be *given* that copy constitution or copy statement of accounts (if any) by the charity in such form as the person may reasonably request [emphasis added]. The Scottish Ministers may by order exempt charities from this duty. Presumably OSCR will adjudicate on any disputes about what is a “reasonable” request.

Commenting on this section of the Bill, the Consultation Paper states on page 12:

“Charities will also be expected to continue to provide their accounts or annual report to any member of the public free of charge, on request. They will only be able to refuse to do so where they can show that the request places an unreasonable burden on them.”

However, under the terms of the current legislation, charities do *not* have to provide free information of this kind. They must provide a copy of their “explanatory document” (defined as “the trust deed of a body or other document constituting the body”<sup>7</sup>) and most recent statement of accounts only “on payment of such reasonable charge in respect of copying and postage as the body may stipulate”.<sup>8</sup> The current legislation imposes no requirement to supply an annual report to members of the public, and nor does the proposed new legislation, although in practice many charities do send an annual report as it contains their accounts.

The current provision to enable charges to be levied in respect of providing an “explanatory document” and accounts has on occasion led to requests for very high charges; for example, from legal firms administering charitable trusts, who sometimes receive multiple requests for information and who would otherwise feel obliged to charge the costs involved to the charities they represent. It has also proved to be an inconvenience for very small charities who receive requests to supply such information. The costs charged by some charities and their agents was probably an unforeseen consequence of including a provision to charge in the 1990 Act and presumably is the reason for its omission in the new draft Bill, but it seems that charities themselves will now have to foot the bill for the provision of this

<sup>7</sup> Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, section 1 (9).

<sup>8</sup> Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, section 1 (4) and section 5 (7)(a).

information. The cost assumptions table on page 44 of the Consultation Paper - which correctly notes that charities may currently re-coup their costs by charging - concedes that the new provision will entail some administrative costs for charities.

**I am against charities having to provide a copy of their constitution and/or latest statement of accounts free of charge to any person who requests it. This information should either be provided by OSCR (with or without a charge) or the charity concerned should be allowed to charge for photocopying and postage.**

## **FUNDRAISING**

Part 3 of the Bill deals with the important and often controversial area of fundraising for charities and other benevolent bodies. This will replace the current legislation, namely, section 119 of the Civic Government (Scotland) Act 1982 and regulations made thereunder. The new measures seek to ensure that fundraising, both by professional fundraisers and by benevolent bodies themselves, is properly controlled. There have been several high-profile cases in which money raised from members of public, allegedly for charitable purposes, has been misappropriated by individuals. The Bill aims to restore public confidence in fundraising of this kind by increasing the statutory powers available, but the Scottish Executive also hopes for a large measure of self-regulation from the sector itself.

This part of the Bill, as noted above, does not apply only to charities but also to other benevolent organisations and good causes. They are given the right to seek an interdict preventing unauthorised fundraising. Professional fundraisers and businesses undertaking promotions for good causes will require a formal agreement with the benevolent organisation concerned, and they will be required by regulations to state to potential donors the amount of funds which will go to the good cause. It will be an offence to solicit money or other property by suggesting that the body is a charity when it is not, and there are measures to protect funds raised, even if they are not held by a charity. I welcome all these measures.

The current legislation refers to “public charitable collections”, and “charitable purposes” are defined as “any charitable, benevolent or philanthropic purposes whether or not they are charitable within the meaning of any rule of law”<sup>9</sup>. The new Bill renames such collections “public benevolent collections”, thereby avoiding any dubiety in the meaning of “charitable” in this connection. Public benevolent collections are collections made in a public place or by means of visits to two or more houses or business premises, and include “promises of money” in order to ensure that direct debit and standing orders are included. The new legislation aims to continue and improve upon the current system whereby collections are licensed by local authorities. There has been much debate about the definition of “public place” in relation to collections of this kind. The draft Bill includes within its definition “a public area within any station, airport or shopping precinct or any other similar public area”, in other words, any place to which the public has unrestricted access when it is

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<sup>9</sup> Civic Government (Scotland) Act 1982, s.119(16).

open. If such a public area is privately owned, the owner's permission will also be required. I welcome all these measures.

Under current legislation so-called "exempt promoters", who organise collections across a range of local authority areas, are exempted from certain of the legal provisions. This has caused problems for smaller, local charities who often find collecting dates booked well in advance by national charities and I have argued for the abolition of the exempt promoter scheme. Under the proposed new legislation "exempt promoters" will be replaced by "designated national collectors", recognised and regulated by OSCR. OSCR will be required to establish the criteria for achieving this status, after consultation. The designated national collectors will have to provide the local authority with three months' notice of any collections they intend to hold and - in order to avoid block booking years in advance - will not be able to give more than eighteen months' notice. Existing "exempt promoters" will be given the new designation on enactment of the Bill until OSCR reviews the matter. I remain unconvinced of the need for "designated national collectors" but welcome the proposals to subject them to a more restrictive regime and to a review by OSCR.

The UK Cabinet Office Strategy Unit report recommended the establishment of a self-regulation scheme for fundraising organisations. The Scottish Executive has decided to allow a self-regulation scheme in Scotland, and awaits detailed proposals on this, but does include in the draft Bill a reserve power to allow further statutory regulation if Ministers feel that self-regulation has not been effective in improving public confidence in charities. I have concerns about the efficacy of self-regulation for fundraising organisations and therefore welcome the provision for further statutory regulation if this is necessary to improve public confidence in charities.

**I broadly welcome the measures aimed at restoring public confidence in fundraising but have reservations about some of the detail. For example, I remain unconvinced of the need for "designated national collectors" but welcome the proposals to subject them to a more restrictive regime and to a review by OSCR. I have concerns about the efficacy of self-regulation for fundraising organisations and therefore welcome the provision for further statutory regulation if this is necessary to improve public confidence in charities. I have expressed my views on public charitable collections in some detail in the publications listed below.**

#### **OTHER PROVISIONS**

Chapter 6 of the Bill creates a new legal form for charities, the Scottish charitable incorporated organisation (SCIO). This new charitable form has been called for by charities and enables them to become corporate bodies with limited liability for members and charity stewards. It will only be available to charities registered by OSCR. SCIOs will be regulated by OSCR and will not be subject to company law. Model constitutions for the SCIO have been developed and there is to be further consultation on the detail of how SCIOs can be established and how existing charities can convert to this new legal form. These further provisions will be set out in regulations. I very much welcome this provision and would like to be part of the further consultation on the SCIO.

Other provisions in the Bill include measures to make it easier for charities, public trusts and endowments to re-organise (Part 2), and the extension of the investment powers of trustees (Part 4). I welcome these measures.

## CONCLUDING REMARKS

I have not commented on every aspect of the draft Bill and appreciate that much of the detail of the new regulatory system will be set by regulations once the Bill has been enacted. However, I am broadly in support of the measures it contains.

In addition to the above response and my work with Dundee University's Charity Law Research Unit, in particular the three reports published in 2000 by the Scottish Executive Central Research Unit,<sup>10</sup> and the book *Charity Law in Scotland*,<sup>11</sup> I have expressed my views on Scottish charity law in the following publications:

- 1) "Draft Charities Bill for Scotland", *International Journal of Civil Society Law*, Vol. II, Issue 3, July 2004, pp.118-124.
- 2) "The Reform of Charity Law in Scotland", chapter in P. Bator, F. Hondius, and P. Lieber (eds.) *Tax Treatment of NGOs*, Kluwer Law International, 2004, The Hague/London/New York, pp. 33-58.
- 3) "The Reform of Charity Law in Scotland: Regulation and Supervision", chapter in Christine R. Barker and Sabine Selbig (eds.), *Charity Law and Change. Gemeinnützigkeitsrecht im Wandel. British and German Perspectives*. Wissenschaftlicher Verlag, Trier, 2002, pp.150-165.
- 4) "Charity Law Reform in Scotland", *International Journal of Civil Society Law*, Vol.1, Issue 2, May 2003, pp.23-34.
- 5) "Public charitable collections - the case for reform", *Juridical Review*, Part 6, 2001, pp.291-306.
- 6) "'Public Benefit' Law in Scotland, England and Wales, and Germany", *Maecenata Actuell*, No.27, April 2001, pp.20-23.
- 7) "Public Charitable Collections: Are they a Worthwhile Cause?", *The Modern Law Review*, Issue 63:6, November 2000, pp.791-812.
- 8) "Scottish Charity Law: Proposals for Reform", *International Journal of Not-for-Profit Law*, 2000/2001, Vol.2, Issue 4, pp.1-5.
- 9) "Scottish Charity Law: Proposals for Reform", *Maecenata Actuell*, No. 23, August 2000, pp.16-21.
- 10) "The Regulation of Charities in Scotland", chapter in A. Dunn (ed.) *The Voluntary Sector, the State and the Law*, Hart Publishing, 2000, pp.87-105.
- 11) (with K.J. O'Halloran) "The Regulation by Public Bodies of Charity Law in Scotland and Northern Ireland", *International Journal of Not-for-Profit Law*, 1999/2000, Vol. 2, pp.1-12.
- 12) "Religion and Charity Law", *Juridical Review*, 1999, Part 5, pp. 303-315.

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<sup>10</sup> *Scottish Charity Legislation: An Evaluation; Public Charitable Collections; Public Trusts and Educational Endowments*.

<sup>11</sup> Published by W. Green/Sweet & Maxwell, Edinburgh, 1996.