

CHARITY LAW ASSOCIATION

CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) BILL

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## Charity Law Association

### Draft Charities and Trustee Investment (Scotland) Bill

#### Introduction

1. The Charity Law Association is an association with over 700 members in all four countries of the United Kingdom. Our members are principally solicitors and barristers/advocates but also accountants and other, non-professional members. The members of this working party were as follows:

- 1.1 Linda Kabi Head of Legal Services, Help the Aged  
(Chairman) -
- 1.2 Andrew Brown Vice President and former Chairman, BTCV
- 1.3 Richard Fries Centre for Civil Society, London School of Economics, former Chief Charity Commissioner and Member of the McFadden Commission
- 1.4 Simon Mackintosh Partner, Turcan Connell
- 1.5 Francesca Quint Barrister, 11 Old Square

2. The purpose of this paper is to outline our comments on the Bill. We have sought to draw comparisons with the draft English Charities Bill where this may be helpful.
3. First of all, we would like to say that we welcome the Bill and what it is seeking to do. In this paper we are aiming to highlight what we think is missing from the Bill or what is required to make it consistent with charity law generally and with other branches of law. This should not be seen as detracting from our general appreciation of the Bill, its contents and the open consultation process that has led to its publication.

4. We would like to see a general obligation on OSCR to act reasonably, proportionately, in accordance with natural justice and with openness and transparency in its decision making.

## **Part 1 - Charities**

### **Chapter 1 – Office of the Scottish Charity Regulator**

#### **Generally**

5. We believe OSCR needs to be independent from Government; the CLA believes that if the public is to have confidence in charities, it must have confidence in their regulator. For credibility as a regulator to be achieved, OSCR must be separate from the Scottish Executive. The Bill currently establishes OSCR as a Non-Ministerial Department. OSCR needs to be an entity established to service the public benefit and uphold the law, not beholden to the Scottish Executive and not within the sphere of governmental policy considerations.
6. To achieve its purposes, OSCR needs to be adequately funded and staffed.

#### **Comparison with the roles of other regulators**

7. The CLA has commissioned a report from Dr. Julia Black of the London School of Economics comparing the role of the CC and OSCR with that of the Financial Services Authority and the Office of Fair Trading. We enclose a copy of that report and would like to highlight the following points relation to OSCR:

##### **7.1 We should like to see OSCR have the following additional duties:**

- to advise ministers,
- to use its resources efficiently and effectively,
- to have regard to the principles of good corporate governance,
- to have regard to principles relating to public bodies, and
- to give advice and guidance on good practice.

7.2 We believe that OSCR should match up to the recommendations relating to formation, governance structure, accountability and operation of independent regulators set out in the report on *Independent Regulators* (October 2003) issued by The Better Regulation Task Force. Dr. Black's report outlines where OSCR will not, as it is currently proposed to be set up, meet the recommendations.

#### Clause 1 – Office of the Scottish Charity Regulator

8. We welcome the intention, as discussed in the consultation document, that OSCR should have a broad and flexible advice and guidance function. It is recognised good practice that modern regulators should devote much of their effort to preventing things going wrong and we are glad that the functions envisaged for OSCR reflect this principle. We agree with the consultation document that it is difficult to draw a statutory dividing line between what one might call regulatory advice giving and capacity building, but we do wonder whether the general function set out in clause 1(2)(b) is too narrow in being limited to compliance with the Act's provisions. We understand that the core of OSCR's supervisory activity will be directed at such matters as good governance and financial administration. These are charity responsibilities which go wider than the requirements of the Act.
9. Clause 1(2)(b) of the Bill gives OSCR a general function of encouraging and facilitating compliance by charities with the provisions of the Act. We believe this should be recast to state that this general function is to promote, encourage and facilitate compliance by charities with the provisions of the Act and charity law generally.
10. Clause 1(2)(a) also seems to us rather limited, in expression if not scope, in focusing on maintenance of the register. That is of course an important function, but follows the crucial charity status determination function. This function is so important that it seems to us to deserve explicit mention on the face of the Bill, perhaps as part of (a), e.g. to determine whether applicant bodies are charities and keep a public register of them.

## Clause 2 - Annual reports

11. We should like to see an obligation on OSCR to publish its annual report within a specified period, such as three months, after the end of its financial year.
12. We feel it is unnecessary for OSCR to be obliged to comply with any direction given by the Scottish Ministers as to the form and content of a general report and would, therefore, like to see clause 2(3) removed.

## Schedule 1

13. The powers of Scottish Ministers set out in Schedule 1 of the Bill again show the need for OSCR to be independent of the Scottish Executive. The Scottish Ministers have very wide powers in relation to Board members and this is a cause for concern. We believe that appointments should be transparent and, to increase independence, open advertising should be used in the recruitment and selection of Board Members. We are concerned to see that Scottish Ministers have the powers:
  - to determine all terms and conditions of appointment, and
  - to remove a member of the Board from office without restrictions limiting such power to dismissal for misbehaviour or incapacity.
14. It also seems unwise that Scottish Ministers' power extends down to the terms and conditions of the chief executive and other employees. This should be within the remit of the Board.
15. We should like to see at least one member of OSCR with a legal qualification and at least one member of OSCR with an accountancy qualification.
16. Being a charity steward should not disqualify an individual from being a member of OSCR. The experience gleaned from acting as a charity steward will be invaluable in this role. Conflicts of interest can be managed in the usual way with the member removing him or herself from involvement in issues relating to charities of which he or she is a charity steward.

## **Chapter 2 Scottish Charity Register**

### Generally

17. The drafting of the Bill suggests that registration with OSCR in the Register of Charities is to be entirely voluntary, and that the intention is that only those bodies which are registered will be entitled to call themselves charities, given the definition in clause 81. However, this may not be the intention of the draftsman, in which case it might be helpful to add a specific obligation on charities in Scotland to register with OSCR.
  
18. On the other hand, there will, it seems, be some supervision of 'public trusts', i.e. bodies recognised by Scots law which include charitable trusts, and of the application of certain funds belonging to former charities which have been removed from the register, but not of charitable companies which have never been so registered.
  
19. We understand that it is the intention that all existing Scottish Charities registered with the Inland Revenue will automatically be transferred on to the Register kept by OSCR and that OSCR will then review Charities on the Register to ensure they supply all relevant information and comply with the new legal definition of a charity. It would be helpful to see a specific provision inserted to this effect.

### Clause 3 - Scottish Charity Register

20. It is interesting to note clause 3(3)(d), which does not have an equivalent in English law. It does not include the fact that a clause 24 inquiry has been opened or the appointment of a judicial factor, although these might be covered by (e) or (f). Sub-clause (5) is encouraging and might be copied for England and Wales.

### Clause 4 – Application for entry in Scottish Charity Register

21. It would be helpful to know what other information may be sought from an applicant under clause 4(d) e.g. whether an applicant's charitable

status will be judged by its activities as well as its purposes. The CLA would be opposed to this.

#### Clause 5 – Determination of application

22. A positive obligation to register in the absence of any reason not to do so would be helpful. At the moment there is only a power to register, a requirement to give reasons for refusing to do so and an appeal against a refusal to register in clause 43(1).

23. We suggest that the word “fully” is inserted before “...set out the reasons for refusal.”

#### Clause 6 – Applications – further procedure

24. We are disappointed that clause 6(1) gives the Scottish Ministers the power to make further provisions for applying and determining applications. We believe all such provisions should be stated on the face of the Bill and not left to later regulations.

25. The time limit in clause 6(2)(c) (the period in which OSCR must make a decision on an application) and elsewhere is healthy and might be adopted in England and Wales with advantage.

#### Clause 7- The charity test

26. We note that charities whose headquarters are in England and Wales (“English Charities”) are to register with OSCR if they operate in Scotland as well. There is no equivalent in the draft English Charities Bill requiring Scottish Charities operating in England and Wales (e.g. The Princess Royal Trust for Carers) to register with the Charity Commission. We are not convinced about the need for English Charities to register with OSCR; the Charity Commission is a powerful and well established regulator and we do not know of any particular issues or concerns that have arisen as a result of English Charities operating in Scotland. Might any concerns be met by appropriate exchanges of information together with authorisation for OSCR and the Charity Commission to take steps in their own jurisdictions at the request of the

other Regulator? If any compulsory requirement for English Charities operating in Scotland to register with OSCR is passed into legislation, we would suggest that a new clause 7(1)(c) is added which states that a body meets the charity test if it is registered as a charity in England and Wales.

27. In contrast with the English draft Charities Bill, the 'descriptions' or 'categories' of charitable purposes referred to in sub-clause (1) and set out in sub-clause (2) are merely called 'the charitable purposes' rather than 'descriptions of purposes', thereby creating an ambiguity in the phrase 'particular purpose' in sub-clause (3), which relates to the purposes of a particular charity.
28. We understand that the intention is that the definition of a charity is to be compatible with the definition in England and Wales. However, in sub-clause (2) the provision of accommodation and care for people with certain needs is set out in two paragraphs - (j) and (k) - instead of one paragraph as in the English draft Charities Bill. It would be better for the two lists to be identical both for convenience and more particularly if it is intended that tax/rates relief will be awarded on the same criteria. As the draft stands, there are needs which are covered by the English draft Charities Bill which are not covered by this draft Bill except in paragraph (m): e.g. there is no scope in paragraphs (j) or (k) of this draft Bill for the provision of equipment or facilities other than accommodation for the relevant people, or for the provision of care for needy people who are ill but are not old, young or disabled.
29. In addition, paragraph (m) is not restricted to charitable purposes recognised from time to time by analogy with existing charitable purposes such as is provided by sub-clause (4) of clause 2 in the English draft Charities Bill. Instead the draft Bill's catch-all is "any other purpose intended to provide community benefit." We believe it is desirable that the two jurisdictions operate to the same definition.
30. Overall, we seriously question whether the charitable activities to be recognised in the two jurisdictions of Scotland and England & Wales are

so different as to require these divergences of definition, given the confusion and inconsistency which is likely to result directly from it.

31. Furthermore, in Clause 7(2)(m) the word “community” is not defined.
32. It is noted that the limitation provided in sub-clause (4)(a) appears to exclude ‘time charities’ i.e. trusts which are exclusively charitable for a limited period and then revert to non-charitable beneficiaries. These are rare but quite lawful in English law so long as the perpetuity rule is complied with.
33. It would be desirable to include an express mention of recreational charities, which constitute an important category of charities which ought to be encouraged in Scotland as elsewhere.
34. In sub-clause (3) there is no reference to the meaning of ‘public benefit.’ We are aware that this is an issue causing considerable debate, both in relation to the draft English Charities Bill and in relation to this draft Bill. In our submission to the Joint Committee of the Houses of Parliament in relation to the draft English Charities Bill, the CLA stated that we consider it to be vital that there is no attempt to codify the public benefit test. We emphasised that a statutory public benefit test would unavoidably alter the existing body of case law that has built up in England and Wales which describes what does and does not constitute public benefit, consequently doing away with centuries of legal precedent and altering the parameters of charity. We believed that, in relating to England and Wales, not only would this create catastrophic uncertainty for all charities, it could also have profound practical repercussions. We are aware, however, that there is no such existing body of specifically Scottish case law and practice, although in relation to charitable status the Inland Revenue applies the principles of English Law. We wonder if it would be helpful, therefore, for the draft Bill to include a provision to the effect that the existing law, as applied in Scotland for regulatory and tax purposes, should be followed.
35. The CLA prepared two papers entitled “Public benefit and independent schools” and “Public benefit and the advancement of religion” for the

Joint Committee scrutinising the English draft Charities Bill. Although these papers were prepared in relation to the English draft Charities Bill, we believe they may be of interest in Scotland also and enclose copies.

36. We recognise the need to cover charities operating outside Scotland; but clause 7(1)(b) seems to bring such bodies within the scope of the Bill even when they have no connection with Scotland. This appears to be the consequence of the fact that the Bill does not restrict registration to charities with their seat of administration in Scotland. No doubt this is necessary to enable charities based outside but operating within Scotland to be covered. But it would appear desirable to prevent bodies with no connection with Scotland from seeking to use Scottish registration as a cover, perhaps by restricting registration to bodies which either operate in, are based in or have property located in Scotland.

37. We recognise the intention to establish a distinctively Scottish concept of charity while providing a framework which encompasses compatibility with other parts of the United Kingdom. One reason for hoping that OSCR and the Charity Commission for England and Wales under the draft English Charities Bill will reach compatible determinations is the difficulty which divergence will present to charities registered in one part of the UK but operating on a UK wide basis. We hope therefore that consideration can be given to making decisions of the Charity Commission in respect of such charities based in England and Wales valid in Scotland, thereby sparing them the need to apply for registration twice, in Scotland and England. (Provisions in the draft English Charities Bill making registration by OSCR of Scottish based UK operating charities valid in England and Wales would of course be reciprocal, but probably otiose since the register of the Charity Commission is confined to bodies subject to the jurisdiction of the English courts.)

### Clause 8 - Guidance on charity test

38. The provision of guidance by OSCR as to how the charity test will be applied is greatly to be welcomed and would be an improvement if adopted in the English draft Charities Bill.

### Clause 9 – Objectionable names

39. This is based on English law but there is no provision for the equivalent of the Charities (Misleading Names) Regulations 1992. Are such regulations considered unnecessary?

### Clauses 10 -11 – Change of name. Power of OSCR to require charity to change name

40. The requirement in clause 10(1) for OSCR's consent to a change of name is stricter than in English law, but probably much the same in practice.
41. The time limit in clause 10(3) is welcome.
42. Clause 11(1) seems more helpful to charities than the express provisions of English law, but again the effect in practice is probably much the same.

### Clause 12 – References to charitable status

43. It might be helpful to specify which bodies which are not 'charities' within clause 81 may not call themselves charities etc. Cf clause 24(1)(d), which enables OSCR to inquire into non-charities which represent themselves as charities, and clause 27(5), which enables OSCR after a s 24 inquiry to direct a charity to stop representing itself as a charity.

### Clauses 13 – 14 – Changes which require OSCR's consent

44. We would question the need for OSCR to give consent to amalgamations and dissolutions (as opposed to be entitled to notification which is the case with the Charity Commission in England

and Wales). If these provisions are, indeed, felt necessary, we would suggest that they are restricted to Scottish charities. We would welcome clarification of how amalgamations with non-charitable bodies are to be dealt with. It seems unnecessary for a charity to be required to obtain the consent of OSCR to apply to the court.

45. It is strongly recommended that clause 13 should be made expressly subject to the powers of the charity concerned under its constitution, so as to avoid the impression that any charity can amend its constitution, amalgamate etc regardless of its constitution.

46. The time limits in clause 14(3) and (4) are welcome.

47. The English draft Charities Bill contains some potentially useful provisions aimed at facilitating mergers and we wonder if these might also prove helpful in Scotland?

#### Clauses 15-16 – Removal from Register

48. Clause 15 makes it clear that it is open to a charity to seek removal from the register at any time. Given that a grant-making charity might have given money to a charity in the basis that it was registered, should there be no safeguards e.g. a requirement for notice to be given on a charity's ceasing to be registered and therefore to be a charity as defined in the draft Bill? Is clause 16 enough?

49. In clause 16(4) presumably a charity could be established specifically to take over such assets – it would not need to be pre-existing. Such a new charity might be needed if the purposes of the dissolved body were very unusual and there was nothing 'closely resembling' it on the register. In clause 16(5) 'those property for its purposes' would be clearer as 'that property for its own purposes'.

### **Chapter 3 – Information about charities**

#### Clause 17 – Public access to Scottish Charity Register

50. It might be helpful to insert a new clause 17(1)(c) to say that the Register shall be available on the Internet.

#### Clause 18 - Power of OSCR to obtain documents and information

51. We believe that 14 days is too short a minimum period within which charities are to be required to respond with information required by OSCR and suggest that the period in clause 18(2)(b) should be 28 days.

#### Clause 19 - Entitlement to be given information by charities

52. It is worth comparing these provisions with English law, under which the constitution, annual report and statements of accounts are available to public inspection at the Charity Commission's offices (see ss 3(8) and 47(1) of the Charities Act 1993) and additionally the accounts only must be supplied within 2 months to a person applying in writing directly to the charity on payment of the charity's reasonable expenses of complying (e.g. copying and postage) under s 47(2).

53. We believe that the reference in clause 19(1)(b) should be to the latest "annual report and statement of accounts", and we do not see the need for the words "if the request is reasonable" nor for the words "in such form as the person may reasonably request" at the end of sub-clause (1).

#### Clause 20 - Sharing information

54. We believe that sub-clause (3)(b) should be worded so as to allow OSCR to disclose information to the relevant person "for the purpose of enabling or assisting the person to exercise any of its own functions."

## **Chapter 4 – Supervision of charities etc.**

### Clause 24 - Inquiries about charities etc.

55. The powers of OSCR to direct charities and other bodies not to undertake certain activities are very strong and we would recommend that such directions be capable of being appealed to the Scottish Charities Appeals Panel.

### Clause 25 - Inquiries about charities etc.: power to obtain documents and information

56. It is worth comparing sub-clause (5) with section 8(5) of the English Charities Act 1993, where the Commission again has power but not the duty to pay necessary expenses of attending to give evidence or produce documents, and immunity for a person required to travel more than 10 miles from home without the offer of reimbursement of expenses.

### Clause 27 - Other powers of OSCR following inquiries

57. The phrase beginning with the words "to be unable" at the end of sub-clause (4) should perhaps be numbered point (c)?

### Clause 29 - Reports on inquiries

58. We believe it would be useful to include provisions that any person or organisation named or otherwise identifiable in an OSCR report be invited to co-sign the report and be given the alternative to append a dissenting report which OSCR must publish with the main report.

### Clause 30 – Powers of the Court of Session

59. Clause 30(4)(c) - in relations to judicial factors, it would be useful for the Bill to make it clear that OSCR pay for their services. This will ensure they are used only when necessary and only to the extent necessary.

## Clause 31 – Transfer Schemes

60. We believe there is a typographical error in clause 31(2) and that it should read "...if it is satisfied...".
61. If the Court is to have power to award expenses against charities and their charity stewards perhaps it should also have power to award expenses against OSCR and its members.

## **Chapter 5 – Charity Accounts**

62. In sub-clause (4) there is provision for the Scottish Ministers to make regulations about the keeping of accounts, preparation of annual accounts, audit and examination of accounts etc. It would be regrettable if such regulations were to have the result of increasing the costs to UK-wide charities by requiring them to produce, in effect, a set of accounts which differ from those they are required to produce for their primary regulator, the Charity Commission or its equivalent in Northern Ireland (when established). We would suggest that sub-clause (4) be drafted so as to apply only to Scottish charities.
63. Clause 37 is a rather heavy handed provision which should only be used when alternative attempts to resolve the matter have failed. In particular clause 37(4) seems somewhat draconian. We believe the normal rule should be that the charity itself pays for the expenses of such an appointed person and that only in exceptional circumstances should charity stewards be made personally liable. There can be extenuating circumstances why charities may be a little late with reports, especially if they don't employ staff. We would suggest that, if OSCR judges the charity stewards are incompetent, it should remove and replace them, rather than charge them.

## **Chapter 6 – Scottish Charitable Incorporated Organisations**

### Generally

64. These provisions relating to a Scottish CIO, or SCIO, are based on the proposals in the English draft Charities Bill but contain less detail. There is a suggestion in relation to the English draft Charities Bill that a CIO should be called an ICO instead. It may be felt unfortunate that the Scot equivalent should be called a SICO.

### Clause 38 – Scottish charitable incorporated organisations

65. There is no express provision whereby a SCIO is incorporated by the act of registration by OSCR (in contrast to the equivalent provision in the English draft Charities Bill) (though see under Clause 42 below). This seems a vital omission.
66. As with the English draft Charities Bill, it would be helpful if the option of limited liability for members/charity stewards were to be spelled out, since there will be no interest in the form without at least limited liability for charity stewards, who may be non-members (see sub-clause (3)), and sub-clause (4) does not mention it.

### Clause 42 – Regulations relating to SCIOs

67. An excessive amount is left to be covered by regulations, which is not desirable. The procedure for registration and its effect, conversion, amalgamation etc. is spelled out in more detail in the English draft Charities Bill, and similar provisions could be included here. There seems no particular reason for different rules to apply in Scotland as this is a new form of charity which does not depend on the existing law in either jurisdiction. The CLA gave extensive comments to the Joint Committee on the CIO provisions in the English draft Charities Bill which we shall gladly supply should they be of interest.

## **Chapter 7 – Reviews and appeals**

### Generally

68. These clauses put into statutory form, and make obligatory where made within 14 days (see 44(1) and (5)), a Scots equivalent of the Charity Commission's existing practice of reviewing decisions internally at the request of the charity or person affected. As such it is a healthy provision for any regulator.

### Clause 43 – Decisions subject to review

69. There is no appeal against a decision to open an s 24 inquiry which we believe there should be.

70. In our view it is essential that the decisions which are subject to review include all those decisions of OSCR which impact on a charity/charity steward or group of charities/charity stewards. This also includes refusals to make decisions including such things as refusal to investigate a charity or body purporting to be a charity about which a complaint has been made by a member of the public.

### Clause 44 – Right to request review

71. The 14 days period in sub-clause (5) may be too short, however, in that it scarcely allows time to obtain professional advice, and may therefore lead to charities and others routinely requesting reviews and thereby lengthening the decision-making process. We suggest a 28 day period might be more appropriate.

72. The same argument may apply to the 14 day time limit for OSCR in sub-clause (3). In this case we suggest a 21 day period is better.

## Clause 46 – Scottish Charities Appeals Panel and Schedule 2

73. The rules of procedure are left to be made at a later date by the Scottish Ministers. This makes it very hard to draw any overall conclusions on the way the Panel will work.

## Clause 47 – Appeals to the Scottish Charities Appeals Panel

74. With reference to clause 47(1)(a), we notice that one cannot appeal against notices served under 43(e) and (f) which refer to clauses 24(2) and 25(1). These are OSCR's power to direct anyone not to undertake specified activities for six months, and OSCR's power to demand any document, copy or information from anyone. Our recommendation is that any decision by OSCR can be appealed to the Panel (whether or not made pursuant to a specific statutory power and including "non-decisions" such as a decision not to make a direction) on any point of law, on any basis.

75. The 28 day time limit for appealing in sub-clause (2) is reasonable.

76. It is encouraging to note that expenses may not be awarded under sub-clause (4), in contrast to the power in the English draft Charities Bill. It should be clarified that the Panel cannot itself charge fees.

77. In respect of clauses 47(3)(b) and (4), we believe that the Panel should have the power to order financial compensation to affected persons should OSCR's decision be quashed.

78. There seems to be no provision for OSCR to refer matters to the Panel for interpretation, which seems unfortunate. Equally, there seems to be no general right of reference to the Panel (for example, by representative bodies), which could be useful.

79. In general, charities cannot afford (or are understandably unwilling) to take expensive legal action, as testified by the tiny number of charity cases taken in recent years. Moreover, charities are run by volunteers. Accordingly, a complex system is likely to deter many charities from

bringing claims to the Panel. We therefore consider it vital that the Panel is inexpensive and simple for charities to use.

80. We recommend that the Panel be obliged to publish its decisions, to ensure transparency and consistency in developments in charity law.

#### Clause 48 – Reconsideration of decision remitted back to OSCR

81. The time limit in sub-clause (2) is welcome.

#### Clause 49 – Appeals to the Court of Session

82. We note that an appeal lies to the Court of Session on either fact or law whereas in the English draft Charities Bill the Charities Appeal Tribunal is the final judge of fact.

83. There is a direct appeal to the Court of Session only from a decision of OSCR to suspend a charity steward, agent or employee under clause 27(4). We question this; it seems quite wrong that the appeal right of a charity steward, agent or employee should be so limited.

#### Schedule 2 paragraph 1(2)

84. Only one lawyer is required (instead of two).

#### Schedule 2 paragraph 1(3)

85. Members of the judiciary are ineligible. This seems a pity.

### **Chapter 8 – General**

#### Clause 50 - Charity stewards: general duties

86. Our view is that it is inappropriate to use criminal sanctions (sub-clause(5)) for all breaches of the general duties of charity stewards. Criminal sanctions should apply only to extreme cases where there has

been deliberate wrongdoing, dishonesty or fraud. We believe that civil sanctions are appropriate for other breaches.

87. The ability for OSCR and the Court to relieve a charity steward from such sanctions should be inserted.

### Clause 53 – Designated religious charities

88. The draft makes provision for a limited class of 'designated religious charity', which is the rough equivalent of a religious charity which is currently exempt or excepted (e.g. by excepting regulations) under English law. It should be noted that a designated charity must be established in Scotland for at least 10 years and have at least 3,000 members over 16, as well as having another regulator.

89. Under sub-clause (5), such charities would not be subject to intervention by OSCR in certain circumstances, and the provisions for the disqualification of charity stewards in clause 51 would not apply.

90. This seems a retrograde step at a time when excepted and exempt charities are to be brought on to the register, albeit gradually, in England and Wales.

## **Part 2 - Reorganisation of charities and public trusts**

### Clauses 54-58

#### Generally

91. These clauses deal with the procedures for reorganisation of charities and public trusts, i.e. public purpose trusts recognised under Scots law as valid, but which are not registered, and therefore not 'charities' as defined in clause 81 of the draft Bill. The general law under which the Court of Session can make *cy pres* schemes for such bodies on the application of their trustees (charity stewards) is not affected. The

'reorganisation conditions' are taken from s 13 Charities Act 1993 and ignore the amendments/additions proposed in the English draft.

#### Clause 55 – Charities: applications by OSCR

92. This enables OSCR to apply to the Sheriff Court for a scheme for a charity where the charity meets yet-to-be-prescribed criteria, and to the Court of Session in other cases.

#### Clause 56 – Charities and public trusts: applications by charity stewards or trustees

93. This enables charity stewards or trustees of a charity or a public trust to apply for a scheme to the Sheriff Court (or the Court of Session) as above. OSCR is given the right to appear, and presumably participate, in the proceedings. It is encouraging to note that, under sub-clause (4), OSCR is not permitted to claim its 'expenses'. Equally, however, it cannot be made liable for another party's expenses. A similar rule regarding the Charity Commission's and HM Attorney-General's expenses in proceedings relating to charities, or at least to charity proceedings, under English law, would be worth considering.

#### Clause 57 – Small charities and public trusts

94. This enables reorganisations to take place by resolution of the charity stewards or trustees, as in English law, in the case of certain small charities and public trusts. It would be clearer if the words 'in any other case' in sub-clauses (3)(b)(ii) and (c)(ii) were to read 'in the case of a public trust'.

#### Clause 58 – Small charities and public trusts – further provision

95. The conditions and procedures are similar to those of English law except that advertising is compulsory (see sub-clause (5)) and that, under sub-clause (6), OSCR has a veto rather than having to give or refuse consent. There is no apparent scope for OSCR to state conditions or advise on what would be acceptable. The criteria for what is a small charity are to be specified in regulations (see sub-clause

(10)). Whilst it would be preferable for them to be stated on the face of the legislation, we believe this approach is acceptable provided that there is plenty of opportunity for consultation on the regulations.

#### Clause 59 - Endowments

96. This brings Scottish educational endowments which are registered as charities in Scotland under the 'charity' regime in place of the existing regulation arrangements. No particular comments are called for.

#### Part 3 - Fundraising and funding for benevolent bodies

97. We welcome the proposed framework for the regulation of fundraising, especially the reliance on self-regulation unless and until it has been found wanting. Whilst the actual provisions for the new framework are complex, they seem to us to focus rightly on the requirement for an agreement between (i) charities and other benevolent bodies and (ii) professional fundraisers and commercial participators soliciting on their behalf with an element of self-benefit. This goes to the heart of public concern, although we are somewhat doubtful whether enforcement in respect of fundraising on behalf of non-charitable benevolent bodies can be effective in the absence of an equivalent to the role OSCR will play in relation to charities.

98. A key issue is how the relationship between professional fundraisers and commercial participators and the bodies they are soliciting for is presented to the giving public. It is understandable that this is left as a detail to be covered in regulations. It will however be a very important detail on which consultation to obtain the views of the sector will be essential.

99. The general power taken in clause 64 if self-regulation is deemed to have failed seems comprehensive. Regulations under this power would presumably subsume and supersede the more limited regulations made under clause 63.

100. We welcome the provisions for regulating public benevolent collections, with relatively simple provisions for local authority consent and designated national collectors.

#### **Part 4 – Investment Powers of Trustees**

##### **Generally**

101. These provisions update the law relating to trustee investments in Scotland. The law is currently governed by a Scottish Act of 1921 and the Trustee Investments Act 1961.

##### **Clause 73 – Extension of general powers of trustees**

102. This widens the scope of the statutory power of investment (except for pension funds authorised unit trusts and other trusts whose powers of investment are governed by legislation). Although it is expressed differently, the result is to bring Scots law into line with the relevant provisions of English law as set out in Trusts of Land and Appointment of Trustees Act 1996 and the Trustee Act 2000. This is helpful.

##### **Clauses 74-75 – Exercise of power of investment/power to amend enactments**

103. Clause 74 inserts a new section, 4A, into the Trusts (Scotland) Act 1921, requiring trustees to have regard to the considerations imposed in relation to English trustees under the Act 2000 – review of investments etc.

104. Clause 75 enables other legislation to be amended by order.

105. It is worth mentioning that there is nothing in the draft Bill to place charity stewards under a Duty of Care such as is provided for by s 1 of the Trustee Act, nor does the draft Bill contain powers of delegation to investment managers and associated provisions as in the Act of 2000. It may be worth considering whether more elaborate provision would be desirable to place trustees on a similar legal footing in both jurisdictions.

## **Part 5 – Supplementary**

### **Clause 77 – Offences by bodies corporate etc.**

106. Clause 77(1)(a) lifts the corporate veil to some extent and removes many of the advantages of using an incorporated vehicle for a charity. This is a pity and we suggest that it is removed. Furthermore the clause imposes criminal sanctions where civil sanctions are more appropriate. Again, we believe criminal sanctions should only apply in cases of deliberate wrongdoing, dishonesty and fraud.

### **Clauses 78 and 79 – Ancillary provision, Orders, regulations and rules: general**

107. The powers of Scottish Ministers in clauses 78 and 79 are extremely wide. We would like to see all necessary matters dealt with in primary legislation, leaving very little to secondary legislation and feel it is a pity that the draft Bill contains so little detail.

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