



**Head Office Scotland**  
204 Bath Street  
GLASGOW  
G2 4HL

Telephone 0141-332-9591  
Fax 0141-332-8493  
Website [www.redcross.org.uk](http://www.redcross.org.uk)

GM/GK

25 August 2004

Ms Myra Watson  
Charity Bill Consultation  
Voluntary Issues Unit  
Scottish Executive Development Department  
2-G, Victoria Quay  
Edinburgh  
EH6 6QQ

Dear Ms Watson

### **Draft Charities and Trustee Investment (Scotland) Bill (“the Bill”)**

I am writing on behalf of The British Red Cross Society (“BRCS”). BRCS is pleased to respond to the consultation exercise on the Bill as we responded earlier to the Report of the Scottish Charity Law Commission (“McFadden”). Set out below are the Society’s main views on the Bill, Consultation Paper (CP) and draft Regulatory Impact Assessment (RIA).

#### **Introduction**

The Red Cross and Red Crescent Movement is the largest independent humanitarian network in the world, with some 100 million members across the globe. One of the most active members of this Movement, the British Red Cross is a leading UK charity with nearly 40,000 volunteers working in almost every community. We respond to emergencies, train first aiders, help vulnerable people to regain their independence and assist refugees and asylum seekers. We respond rapidly to disasters and conflicts across the world.

BRCS in general very much welcomes publication of the Bill and in particular the Scottish Executive’s recognition of the importance of the voluntary sector in Scotland as well as in the UK as a whole. The vibrant and growing voluntary sector needs and deserves a modernised and robust regulatory and legal framework, which serves and supports it well. BRCS therefore strongly supports the widely shared view in Scotland that this proposed legislation should be in

place as soon as possible. We very much hope that the Bill will be introduced by the Scottish Parliament in October/November this year.

In particular, BRCS in general very much welcomes the bringing together of Scots charity law requirements in one place for the first time, as there is clear public interest in effective regulation. We very much support the five key principles of such regulation as set out at p6 of the CP. We also agree with the Scottish Executive's aims that the Bill should help improve public confidence in the sector, since without the effect of regulation of charities in Scotland there is clearly a risk to public confidence in the sector as a whole.

We welcome the two complementary approaches referred to in the RIA when framing the new legislation, namely:

A single Charities Bill (repealing existing legislation) to provide a basic framework to safeguard the public interest and ensure proportionate regulation of charities

This legislation to be boosted by a robust system of self-regulation to be developed by the charity sector itself

BRCS also warmly welcomes the Scottish Executive's expressed willingness to consult widely to hone the Bill. We note that many of the practical implications arising from dual registration/regulation for a charity such as BRCS, registered with the Charity Commission in England and Wales but operating in Scotland (and indeed UK-wide), are likely to be included in secondary legislation yet to be drafted. We would be very willing indeed to participate in further consultation (together if thought sensible with other UK-wide charities) in the process leading up to such secondary legislation, particularly as it affects a charity such as us operating UK-wide.

We welcome the stated aim of the Scottish Executive to seek to ensure that the Bill's proposals complement the approach being taken in England and Wales, given that it is seen to make good sense for the Scottish measures to fit with the English approach. [In view of the current proposals published in the draft English Charities Bill we particularly believe that as far as possible it is desirable for there to be a consistent approach and application of charitable principles, governance, registration and regulation across the whole of the UK, giving due regard to different legal systems.]

### **Dual registration/regulation for UK-wide charities**

Our general welcoming of the Bill is, however, subject to the points made below.

Under the Bill, BRCS as a charity operating in Scotland will be obliged to register with the Office of the Scottish Charities Regulator (OSCR). Whereas we agree with the need for BRCS to be registered with OSCR, we urge that great care be taken to avoid wherever possible any disproportionate regulatory duplication and bureaucracy (with consequent expense) for UK-wide charities such as BRCS. Clearly the more resources spent on regulatory compliance issues, the fewer the resources available for charity objectives. We note that as to the cost of dual registration/regulation for charities such as BRCS under the RIA (page 43) it is acknowledged that such registration requirements will create some additional administrative costs for charities subject to dual registration (which it is stated it is impossible to quantify). We regret that we too are at present unable to provide you with any evidence of the likely additional costs this will involve. We urge, however, that every effort is made to minimise the additional administrative

costs when the Scottish Executive is formulating proposals for the necessary secondary legislation/guidance.

We note that p13 of the CP gives the Scottish Executive's rationale for dual regulation – namely "We believe it is very important for the public to know that any charity operating in Scotland is subject to the requirements of Scots Law, and therefore this dual regulation and registration is justified. We are clear that in practice, information technology and the sharing of information between regulators will mean that charities should not be unduly burdened by being required to register in two places and comply with two regulatory processes." Neither of the statements, however, is fleshed out any further. We expect these very important issues to be covered in the drawing up of secondary legislation and Guidance in which we would be happy to participate.

We note that the OSCR will be expected to co-operate with other regulators, for example the Charity Commission, to minimise the burden of registration on charities already registered elsewhere. Clause 23 of the Bill requires such co-operation. At p45 of the RIA it states that this should have a positive effect as it should reduce the impact of the administrative burden on charities subject to dual registration/regulation. However we do not know what the extent of such co-operation to date is. The CP states that OSCR will take what is described as a proportionate approach to information requirements for charities with more than one regulator and we are specifically told that there will be no requirement, for example, for charities such as us to provide separate Scottish accounts or reports to OSCR and that we will be expected to provide consolidated information on our UK operations to OSCR in the same way as we currently do to the Charity Commission. We would expect to see further amplification of these commitments either in secondary legislation or in guidance.

We should like there to be clarification (in Guidance or elsewhere) that there is not going to be any divergence in practice in the treatment of those charities such as BRCS who will only be able to describe ourselves as "a charity", "a registered charity" or a "charity registered in Scotland" (Clause 12(1) of the Bill) and of those which under Clause 12(2) are established under the law of Scotland or are "managed or controlled wholly or mainly in or from Scotland", which may also refer to themselves as a "Scottish charity" or a "registered Scottish charity". We would like assurance that there will be no discrimination in practice in relation to access to statutory funding or indeed in any other way between the two types of charities operating in Scotland.

We are concerned about a significant omission from the Bill as currently drafted. This is that if there is to be dual registration for BRCS in Scotland the Bill itself at present fails to limit the powers of OSCR in relation to the Scottish assets of charities such as BRCS which are obliged to register with it. Reference is made in the CP/RIA to this, but there is nothing expressed on the face of the Bill. We believe that something needs to be. This is because the powers of the OSCR under the Bill extend to charities as defined and an organisation such as BRCS which provides public benefit in Scotland or elsewhere. Under Clause 3 of the Bill BRCS must register with the OSCR, under Clause 10 BRCS has to obtain OSCR's consent to any change of name, under Clause 11 the OSCR has power to require BRCS to change its name; under Clause 12 BRCS must abide, inter alia, by the regulations to be issued about publishing our charitable status on notepaper and other documents – these requirements may of course be different in Scotland from those in England and Wales and Northern Ireland. Clause 13 will apply to BRCS. We would point out that these particular powers under Clause 13 are unsatisfactory because although under Clause 13(6) consent is deemed to be given by OSCR, that consent can then be revoked, leaving a state of uncertainty. BRCS will also have to abide by Clauses 14, 18 and 19. In respect of Clause 19 (Entitlement to be given information by charities) it should be noted that this contrasts with the

position under English law whereby members of the public can only request the charity's most recent accounts under Section 47 Charities Act 1993.

We urge in particular further consideration of the practical import of Clause 24 (Inquiries about charities etc.) whereby OSCR could launch an inquiry into BRCS and there could be a dual inquiry system i.e. whereby the Charity Commission is investigating the BRCS as a whole and then OSCR also investigates the Scottish aspect of our activities. This statement is of course predicated on the basis that OSCR's activities are indeed limited to investigating our activities in Scotland, which as stated above, needs to be clarified on the face of the Bill. As a result of OSCR's powers to launch inquiries BRCS would also be subject to Clauses 25 and 27. We urge there to be full recognition of the consequences of being subject to dual regulation in these respects.

We also believe that Clauses 31, 32, 36 and 37 will all apply to BRCS.

In relation to Clause 50, whereas we believe the duties of a "charity steward" are very close to the duties imposed upon a trustee under English law, we would support the views of the SCVO that it would be preferable to have a UK-wide phrase, and retain the word trustee.

We therefore urge that the practical implications of dual registration/regulation be adequately considered and addressed where relevant in the Bill itself as well in secondary legislation. The aim should be to ensure that UK-wide charities operating in Scotland are not subject to unnecessary costs and expenses which cut across the UK Government's desire to ensure that charities operate in a cost-effective manner without excessive centralised costs.

#### **Fundraising and funding for benevolent bodies**

In general terms we welcome the proposals of the Bill, in these matters, particularly as to date there has been a lack of a clear legal framework in Scotland for fundraising. We agree with the Bill's aims of setting out the fundamentals for transparent charity fundraising, but with a system which will be further developed by self-regulation within the sector with the fall-back position (as also envisaged by the English Charities Bill) of further Government regulation if the Scottish Executive considers that self-regulation doesn't work. We welcome the statement that "Government has no interest in increasing red tape for charities raising funds".

We are concerned, however, that there are certain inconsistencies between the proposals under the Bill and those under the draft English Bill. The controls on public charity collections have long been confusing and differences between the laws in Scotland, England and indeed Northern Ireland have been a source of difficulties for many national charities. This is a welcome opportunity to ensure that fundraising law is co-ordinated and aligned between at least England and Wales and Scotland in order to enable charities (and in particular UK-wide ones) such as BRCS to carry out our fundraising in as seamless and efficient a manner as possible, thereby reducing fundraising costs. The Government has expressed itself keen on charities reducing costs and we believe this is an ideal way of assisting us to do so. We therefore recommend that consideration be given to the following matters to be dealt with in the Bill:

We welcome the extension of the controls on professional fundraisers and commercial participators to Scotland and note that the draft legislation is very similar to the comparable provisions in the Charities Act 1992 of England and Wales, although references to the collection of property have been dropped and been replaced by references to promises of money. There is, however, one definition where this has not been followed and that is in the definition of professional fundraisers in Clause 60(1)(b) of the Bill where a reference to "or other property"

has been inserted. This change (i.e. a reference to promises of money) has not been included in the draft English Charities Bill.

We note, however, that in Clause 60 (5) of the Bill the definition of representing and soliciting is not quite the same as in English law. We would urge that the two legislatures ensure that there is no distinction between the two.

In Clause 64 dealing with fundraising by benevolent fundraisers, which provides that the Scottish Ministers may introduce regulations to control fundraising, a comparison needs to be made with the Clause 64(A) of the draft English Charities Bill. We welcome the obligation under the Bill for the Ministers to be obliged to consult prior to making regulations, but we would urge that the Bill be further amended to ensure that these powers can only be triggered if Ministers have reasonable grounds for believing that there has been extensive breach by benevolent fundraisers of the obligations set out in Clause 64(4)(c) of the Bill.

In relation to the regulations to be drafted about statements to potential donors/contracts between commercial fundraisers and commercial participators and charities we hope very much that the learning of the last 10+ years in England and Wales of certain difficulties caused by the similar Regulations in England and Wales can be taken advantage of for the Bill.

As is the position in England and Wales, it is proposed under the Bill that charities will be able to prevent unauthorised fundraising in their name. Again, there has been this provision in English Law for over ten years now. In practice we find the problem is one of enforcement and of interesting the police/Crown Prosecution Service and others when third parties deliberately flout the law. We welcome the fact that under the Bill OSCR will have the power to investigate questionable collectors and the general power to protect charity assets.

When it comes to public benevolent collections we are concerned that in several aspects the Scottish proposals are different to the English. The key differences are:

There will not need to be a Certificate of Fitness from the Local Authority under the Scottish proposals, which we welcome.

We also welcome the Scottish proposals for a designated national collector under Clause 68; national exemption licenses under the House-to-House Collections Act 1939 are being withdrawn under the English Bill.

We again welcome the Bill's proposal under Clause 67 that applications for Local Authority consents can be made no earlier than 18 months and no later than 2 months prior to the proposed date of the collection contrasting with the English proposals of 6 months and 14 days. We believe that the Scottish formulation is superior, allowing national charities to plan long-term from year to year in connection with regular annual events (such as Red Cross Week).

We note that under Clause 66(2) of the Bill the definition of areas excluded from the definition of public place does not include a churchyard etc. as under the comparable definition in the English Bill (Clause 65(A)(1)(b)(i)). We would welcome clarification of whether this is a deliberate omission, or is for technical reasons.

Lastly, we welcome the fact that there are no proposals contained in the Bill to regulate door-to-door collections by charity shops, which had been a significant concern in relation to the McFadden report.

## **Definition of Charity**

BRCS is in general content with the Bill's new statutory definition and also a second stage public benefit test. At first sight the proposals in the Bill in regard to these matters do indeed seem to be parallel and complementary to the ones in the English Charities Bill. However, there might quite soon be divergence between Scotland and the position in England and Wales. The CP itself recognises that with two different parliamentary processes for the English Charities Bill and the Bill it is not possible to predict whether the legal definition of charity will in the end be compatible north and south of the border.

Again the CP states that with two different charity regulators interpreting the definition it is possible that decisions on charity status may diverge over time. What the CP doesn't refer to at all is the fact that in the English Charities Bill it is specifically stated that the English Bill preserves the charitable status of existing charities under the new law and also expressly states that the purposes that were charitable under the previous law will continue to be charitable under the new one. The Bill is silent on both these issues and so guarantees neither. We think it is very likely therefore that as time passes the definition of charity may well diverge, which in view of UK-wide tax relief for all charities is not in our view ideal.

As for the specific questions posed at paragraph 7 page 11 of the CP regarding public benefit, BRCS agrees that the interpretation of public benefit should be left out of the Bill itself. We welcome the absence of any statutory definition of what constitutes public benefit as over time the test will be able to evolve in line with the needs and demands of society. The lack of any statutory definition will also ensure that political interests do not influence the way in which public benefit is defined. However, we note that this of course gives very considerable discretion to the OCSR as regulator and issuer of guidance on the subject, as unlike the Charity Commission the OSCR is not going to have to comply with previous case law. We also note that the final arbiter of this question in Scotland will remain the Scottish Courts.

Finally, BRCS would very much welcome the opportunity to continue to be consulted on the next legislative and regulatory stages following the closure of the deadline for responses on the Bill.

Yours sincerely



Gerald McLaughlin  
UK Director, Scotland