



211

ERSKINE STEWART'S MELVILLE SCHOOLS

Principal: **J N David Gray**, BA

Vice Principal and Headmaster of the Junior School: **Bryan Lewis**, BA

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

23rd August 2004

Dear Ms Watson

I am writing to respond to the Draft Charities and Trustee Investment (Scotland) Bill on behalf of the Erskine Stewart's Melville Schools.

Having read the proposals I find myself largely in agreement with the principles of the Bill, namely that regulation should promote independence, proportionality, accountability, transparency and consistency while recognising the new definition of charity incorporating its thirteen charitable purposes within which current organisations holding charitable status, such as our schools, would have little difficulty in corresponding with a number. In addition, I am largely in agreement with the proposal that all charities, irrespective of their specific area of interest, should have to satisfy a public benefit test, rather than at present, for a number of these to be assumed to be of public benefit *per se*.

I would agree that there is a general understanding of charity in United Kingdom society, such that special status is awarded to organisations which provide a wider benefit for the common and public good or which look after particular disadvantaged groups. I do not believe that the interpretation of public benefit should be specifically defined by a range of criteria in the Bill, partly because a definition of such a broad philosophical principle would be semantically demanding, if not impossible, and partly because I believe that each charitable organisation would be able to define its own public benefit in a manner distinctive from that of others. There would also be an assumption in defining public benefit in the Bill that there was something singular and particular to all charities, rather than its being a diverse, divergent and heterogeneous sector. Better therefore, in my view, to allow the regulator to determine whether the broad principle of public benefit has been satisfied by individual charities in their own ways and by their own methods. Apart from anything else, if the power of interpretation were removed from the authority of the Regulator, it would largely emasculate such a role and reduce it to a simple function of the law.

Moving on to the form of the Regulator and the accountability of the OSCR, I note that the annual revenue funding required for the office of the regulator will be in the region of £2 to £3 million. Regulation can often be seen as a non-productive exercise and it

THE MARY ERSKINE SCHOOL

Ravelston Edinburgh EH4 3NT
Tel: 0131 347 5700 Fax: 0131 347 5799
Email: schoolsecretary@esmgc.com
www.esms.edin.sch.uk

THE JUNIOR SCHOOL

Queensferry Road Edinburgh EH4 3EZ
Tel: 0131 311 1111 Fax: 0131 311 1199
Email: jssecretary@esmgc.com
www.esms.edin.sch.uk

STEWART'S MELVILLE COLLEGE

Queensferry Road Edinburgh EH4 3EZ
Tel: 0131 311 1000 Fax: 0131 311 1099
Email: secretary@esmgc.com
www.esms.edin.sch.uk

would therefore be essential that the OSCR's annual accounts were available to the public alongside the annual report, since part of the purpose of the Bill is to avoid wastage or misuse of charitable funds. It would be essential that equally the Office of the Regulator were similarly transparent in its activities and be shown to be using its resources prudently and effectively.

Given that the Regulator and the appointed commission associated with the OSCR are likely to have extensive powers of interpretation and judgement over charitable bodies, in spite of the fact that they will be accountable to the Scottish Parliament, it is clearly desirable that the composition of this body should be balanced, apolitical, and have a thorough understanding of the Act of Parliament and of the purposes and aims of the operation of the OSCR. If the composition of the body were not balanced or properly independent, there would be a danger of partiality in its determinations on particular charities.

The term "Charity Steward" would seem inappropriate in the case of schools holding charitable status where members of the governing board or council are described as "governors" and in their role in upholding the purposes of the charitable organisation are trustees with concomitant liabilities. I do not understand why such individuals cannot be called "trustees" and do not see the danger of confusion. They are after all, as trustees, entrusted with the oversight of the charity and as such have particular responsibilities which are best understood by the publicly recognised term of "trustee", an expression enshrined in law and with the perceived status appropriate to the importance of the position.

Under "Duties of Charity Stewards" it is stated that Charity Stewards' duties as set out are intended to ensure that the Charity Stewards are free from external direction. The rationale is that this underpins the principle that charities governed should be independent from government, funders and other external interests. In the case of schools holding charitable status, the prime funders are parents who pay school fees. If the proposal to exclude funders from the governance of charities, is approved and becomes an Act of Parliament, this would effectively mean that parents would be excluded from sitting on governing bodies of schools which their children attended and which had charitable status. This would seem to be an unreasonable exclusion. While an independent school holding charitable status may not have parents on its governing body as of right, it is quite likely that it will have parents on its governing body acting in another capacity, according to the constitution or scheme of government of the school. For example, in the case of schools associated with bodies such as livery companies or universities which may well have within their scheme of government the requirement to have a governing body appointee from that university or livery body, it is not inconceivable that such an appointee could concurrently be a parent of a pupil at the school.

Under the section on disqualification and on powers to deal with wrongdoing in charities, I would firstly question how the OSCR would respond to a complaint or determine whether any suspicion aroused by a plaintiff were worthy of investigation or not. It is only too easy for an aggrieved or dissatisfied parent at a school to bypass the normal process for complaint through school and governing body, or, if unsatisfied, to go beyond that in order to have such a grievance upheld. The OSCR would need to define very clearly in its own terms what amounted to a reasonable suspicion about the management of a charity and to clarify precisely how any investigation would be carried out. It would also need to ensure that such investigation was proportionate,

thorough and not unduly protracted so as not to interfere unduly with the perennial operation of the organisation. I would suggest that if complaints are brought forward, they should at least be substantiated in such a way as to enable the OSCR to have proper grounds for suspicion, either of the conduct of the Charity Steward (if that is to be the term), or of the governance or management of the organisation.

I note that the OSCR would be able to freeze bank accounts, securities or property and restrict the transactions entered into by a charity or body holding itself out as a charity for up to six months. This would seem to be a gross overreaction in the case of, for example, a school, particularly in advance of any investigations of a suspicion of misconduct being satisfied. In the case of a school holding charitable status, restriction on transactions entered into by the school, or the freezing of bank accounts, securities or property could effectively close the organisation for good and seriously hinder its ability to operate on an every day basis as an educational establishment. Surely while it may be justifiable for the OSCR to have such powers, there should be a clause defining conditions under which it would be enabled to exercise such powers and defining circumstances under which such powers would not be exercised in order that the organisation could continue exercising its functions in a proper sense until an enquiry was concluded.

I also note that the OSCR could apply to the Court of Session and that the Court could appoint a judicial factor to manage the charity, appoint or remove Stewards, or freeze any monies, securities or property and that the Court would also be able to approve a scheme set up by the OSCR for the transfer of assets to another charity. In the case of schools holding charitable status, this again would appear to be gross interference in their governance or management. If a school holding charitable status were to close, the idea that its assets should be perfunctorily removed by a public body and distributed at will to other charities serving a similar purpose, would appear to be disproportionate and inappropriate. I can appreciate that this particular aspect of the Bill is probably designed for organisations holding charitable status for very different reasons from establishments such as schools, but if that is the case then it needs to be clarified and distinguished within the wording of the Bill.

Under Section 6 "Improving the operating environment for charities", I would ask under (b) for clarification of the proposals for charities wishing to change from charitable to non-charitable status. It is suggested that a charity wishing to abandon its charitable status would need to make an application for prior written consent of the OSCR which would only be able to give consent were it satisfied that the change of status would not affect the application of any property or income. This presumably means that the property and income should be used in the same field as that for which it was used under charitable status. Nevertheless this needs to be clarified. As stated it is ambiguous. Similarly, I note that the OSCR will ensure that any remaining property after the winding up of a charity, after it has met its claims and liabilities, would be transferred to another charity with similar purpose. This again would seem to be high handed and an interference in the governance and management of the organisation by a public body. I am equally surprised that the OSCR would continue to have a role in the oversight of an ex-charity as to the management of its assets, although I recognise that this would be, as far as it is clear, exclusive to the locked assets of the charity for which separate accounts would be required.

Under a new legal form for charities – The Scottish Charitable Incorporate Organisation – I would confirm that we would like to be involved in this further consultation on how existing charities can convert to SCIOs.

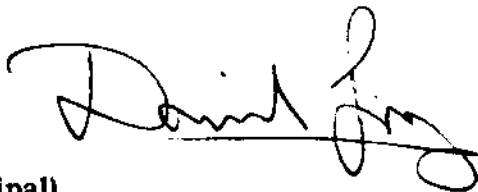
Under “Costs”, I understand that there will be no duplication of accounts created by the compliance costs associated with the lodging of annual accounts of charities with the Charity Regulator, since schools holding charitable status are already bound by legislation to produce accounts available to the public which conform with current charity legislation, as described in SORP 2.

I would however hope that all forms of duplication, repetition, or the need to provide accounts in a different form from that currently provided are avoided.

Under 7 “Enforcement and Sanctions”, it is suggested that there will be fines for organising public benefit benevolent collections without a licence. Organisations holding charitable status such as schools regularly organise such collections. For example, this year the schools which I lead raised £14,000 for leukaemia research through a concert, a mini-marathon and various other activities. The section on “Enforcement and Sanctions” suggests that in future a licence would be required from the local authority in order to hold such collections. This needs to be clarified and equally it needs to be confirmed that there will not be a cost of any kind in order to obtain such a licence which effectively would be an indirect local tax on charitable donations. It also needs to be clarified under the section on fundraising that a licence would not need to be obtained when the fundraising by the charitable organisation was for the benefit of the purposes for which that charitable organisation existed.

In conclusion, having read both the principles and the detail of the Bill, much of it makes very sound sense but I do believe that the devil will be in the detail which, if left unsatisfactorily resolved, could undermine the Bill’s purposes.

Yours sincerely



(Principal)

Email: principal@esmgc.com