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Dear Ms Watson

DRAFT CHARITIES & TRUSTEES INVESTMENT (SCOTLAND) BILL

This firm acts for a number of charitable bodies (principally, but by no means wholly) grant-makers and I write now with a number of comments.

A list of the names of the Partners may be inspected during office hours at each of the addresses given above



Definition of Charity and meeting the test

Section 7 deals with the charity test which has two prongs:-

- (a) Meeting one or more "of the Charitable Purposes" and
- (b) Providing public benefit in Scotland or elsewhere.

Given the close correspondence between the proposed definition of charitable purposes in both the Scottish and Westminster legislation, and the great desirability from a UK taxation point of view of having identical definitions, it would seem highly desirable that charitable purposes were defined in exactly the same way in both sets of legislation. I have listed the criteria from both sets of draft legislation in order to illustrate the points of difference as well as similarity.

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Scotland	England
(a) Relief or prevention of poverty	1. Same
(b) The advancement of education	2. Same
(c) The advancement of religion	3. Same
(d) The advancement of health	4. Same
(e) The advancement of civic responsibility or community development	5. Reference is to "citizenship" rather than civic responsibility
(f) The advancement of the arts, heritage, culture or science	6. Same, but omits culture
(g) The advancement of amateur sport	7. Same
(h) The advancement of human rights, conflict resolution or reconciliation	8. Same
(i) The advancement of environmental protection or improvement	9. Same
(j) The provision of accommodation to those in need of it by reason of age, ill-health, disability, financial hardship or other disadvantage	10. Relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage, including the provision of accommodation or care (this should be contrasted with the Scottish provision and purposes (a) and 1. in Scotland and England
(k) The provision of care to the aged, people with a disability, young people or children	
(l) The advancement of animal welfare	11. Same
(m) Any other purpose intended to provide community benefit	12. "Any other charitable purposes currently recognised, analogous to any of the charitable purposes listed above"

Of course, there remains the "public benefit" test which in England falls within the review and purview of the Charity Commissioners and which in terms of Section 8 of the Scottish Bill we are to find from guidance issued from time to time by OSCR.

This would appear to pave the way for a greater politicisation of the field of charitable endeavour than exists at the moment, where public benefit is a concept which undergoes continuous development through the Courts. It may be argued that judge-made law is not democratic, but it contains a valuable guarantee of impartiality and has ensured that availability to the public is an essential for recognition. If either Parliament took violent exception to a judicial decision that decision could of course be reversed through legislation. This would ensure full public debate and scrutiny, in a way that will simply not exist if decisions of this type are left to OSCR and the Charity Commissioners. Public benefit can be both direct and indirect; for instance, it may be said that education per se can be a qualifying public good if it increases the overall knowledge and intelligence of the population as a whole, but the courts have held that, to qualify, such education must be accessible. They have also held that being accessible does not necessary mean "free". Public benefit as such is not defined in the

Bill but at some future date perhaps some such definition will be imposed. The guidelines to be issued by OSCR under Section 5 and the provision therein made regarding the power of the Scottish Ministers to make regulations would seem to open the way to back-door definition.

Issuing guidance on meeting the "charity test" will be of great help to those involved with the creation and management of charitable bodies, but there are possible dangers, and it might be more satisfactory at the present stage to provide broad criteria based upon existing case law.

Registration and deregistration

The provisions regarding information to be provided to OSCR under Sections 13 and 14 et seqq seem fair and reasonable and it is helpful to provide a mechanism for bodies wishing to do so to seek removal from the Scottish Charities Register while ensuring that the funds held for charitable purposes are still applied in that way.

Information to the Public

The provision of information to the public in terms of Section 19 is a departure from the current provision under which copies of a charity's foundation documents and accounts must be provided at a reasonable charge to members of the public who seek them. Section 19 restricts this information to the accounts, but, equally, directs that the accounts should be provided free of charge. The existing provisions seem both fairer and more comprehensive.

OSCR's form, appointment & functions

Having regard to the considerations voiced in the Consultation Paper it would be reasonable for OSCR to be a Non-Ministerial Department. It would also seem reasonable for the Scottish Ministers to appoint the members (whose numbers would also seem reasonable) including the Chairman and Deputy Chairman, while the board itself appoints the Chief Executive and staff. However, excluding charity stewards (even if that term is narrowly defined) from membership would appear to hamper OSCR in its work, for many of those best qualified by calling or experience are likely to be involved themselves in charitable activities as trustees, directors or administrators.

While intended to be helpful in enabling OSCR to fulfil its functions of keeping the Register of Charities, overseeing their compliance, and dealing with misconduct, giving OSCR power to "do anything" seems at first sight rather wide.

OSCR's responsibility with regard to the nomenclature, amalgamation, winding up and alteration of purposes would seem reasonable together with the provisions to remove a body from the Register.

The proposed provisions regarding OSCR's power of enquiry and regulation and the requirement to be accountable through issuing a Report are welcome. The grounds upon which OSCR may approach the Court of Session are reasonable and OSCR's powers with regard to accounts seem reasonable also. Care needs to be taken to keep the costs of compliance to a minimum.

It is entirely right that OSCR should publish the procedures by which it will conduct the reviews referred to in chapter 7 of the Bill. The appeals panel may provide a more expeditious manner of settling appeals than through the courts, and its effectiveness may be enhanced by ability to include charity stewards among its members.

Suggested term "charity steward"

This suggested new term is easy to understand and the concept of stewardship in popular use is appropriately wider than that of Trusteeship. It would appear to be broadly similar to the concept of "charity trustee" in England. It would seem appropriate that this term should explicitly include those who under the current law are concerned in the "management or control" or recognised charities. If it is not intended to include these people, there would appear to be no justification for introducing another term of art.

Duties of charity stewards

It is right to emphasise the responsibilities of charity stewards. The existing responsibilities of trustees and those involved in the management or control of charities are well known and the existing standards are high and well understood. The accepted standard of behaviour has for many years been settled as the ordinary care and prudence which a business-like person would bring to the management of his or her own affairs. It is suggested in Section 50 that this should be changed to the management of *another* person's affairs. This may be intended to import a higher standard, as may the requirement that charity stewards employ any special knowledge or expertise which they may have acquired through their profession or calling. A potential danger about this is that it may prove more difficult than it has done until now to recruit people of adequate interest and standing to be charity stewards. It also raises the spectre of professional indemnity in a more solid and worrying form.

Section 77 echoes existing legislation regarding those in management or control in including them among those such as directors, managers or secretaries of corporate bodies and partners or purported partners in partnerships. It would seem very reasonable to include all these people within the concept of "charity steward".

Sections 51 and 52, dealing with disqualification from acting as a charity steward, seem reasonable.

Reorganisations

These proposals should be helpful in enabling recognised bodies to adapt to changing circumstances.

Fundraising for and by benevolent bodies

The general thrust of these provisions should bring about greater openness and accountability as well as the protection of the public. Empowering charities to seek interdicts under Section 62 against unauthorised fundraising is good, but it is a pity that the RIA referred to "injunctions".

Scottish Charitable Organisations

I should like to be involved in this further consultation

Mixed regulatory model

In the Consultation Paper it is hoped that the charity sector will “develop and establish an appropriate model for self regulation, to review its effectiveness, and to ensure that fundraisers within the charity sector are properly trained to follow agreed codes. Bodies such as the Institute of Fundraising Managers and SCVO may well consider themselves to be well placed to fulfil such functions.

Summary RIA

Option 2, establishing a foundation of statutory regulation with additional self regulation, would indeed appear to be the best option, meeting both the call of the charity sector and others or measures to improve public confidence, yet establish flexible regulatory systems based upon the experience of practitioners.

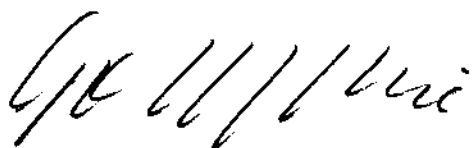
Regarding the cost assumptions related to key Bill sections, it is assumed that the removal of the presumption of public benefit (Sections 7 and 8) will be “neutral”; in fact, I think this is unquantifiable.

Requiring charities to produce information to the public is reasonable, but they should be entitled (as at present) to make a reasonable charge for so doing.

The provisions regarding duly examined or audited accounts proposed under Section 36 refer to “existing accepted practice” under the current regulations and SORP. The existing provisions are not well adapted to grant-making bodies whose income derives from endowments, and members of the public accustomed to ordinary forms of accounting can find the currently prescribed forms of accounting difficult to follow.

Scottish Charitable Incorporated Organisations, as proposed in Chapter 6, may prove to be popular. Good regulation and an avoidance of over-prescriptive forms may well encourage its use.

Yours sincerely



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