

CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) BILL: AN OVERVIEW

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The Charities and Trustee Investment (Scotland) Bill was introduced to Parliament on 15 November 2004.

This briefing provides an update to [SPICE briefing 03-26](#). It gives some background on the charitable sector in Scotland; the legislation that governs the sector at present; and the policy background to the introduction of the Bill. It then provides a broad overview of the Bill. A series of further, more comprehensive, briefings which will examine separate parts of the Bill in detail will be produced to coincide with the Communities Committee's Stage 1 consideration of the Bill.

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KEY POINTS OF THIS BRIEFING

- It is estimated that there are over 28,000 charities in Scotland, 67% of which have an income of less than £25,000 per annum.
- The definition of a charity used by the Inland Revenue and the Charity Commission of England and Wales dates back to the *Charitable Uses Act 1601*.
- Charity law has developed differently in each of the countries making up the United Kingdom. In England and Wales legislation concerning charities has been passed at numerous points over the past several centuries, whilst in Scotland a “laissez faire” approach to charities existed until the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1990*.
- Since the 1990 Act there have been several reviews of charity law in Scotland culminating in the Scottish Charity Law Review Commission (‘the McFadden Commission’), which reported in 2001. After a lengthy consultation process the Charities and Trustee Investment (Scotland) Bill was introduced on 15 November 2004.
- The Home Office produced a draft Charities Bill for pre-legislative scrutiny by a joint committee of the House of Lords and the House of Commons which reported its recommendations in September 2004. The UK government plan to introduce a Charities Bill in this Parliamentary session.
- The Charities and Trustee Investment (Scotland) Bill removes the presumption of public benefit for all charities and introduces the two-part “Charity Test”.
- The Bill also allows for a proportionate regulatory regime to be introduced by Ministers.
- The Bill introduces a new legal form for charities to take on corporate status, and limit liability for their members.
- The Scottish and the UK Bills differ in some degree, but overall are complimentary.

INTRODUCTION

It is estimated that there are over 28,000 charities in Scotland. The sector has been keen on reform of the legislative framework which governs the sector for a number of years. The main areas of work undertaken by the sector are religious activity, social care, culture and education. Charities are the largest component of a wider group of organisations described as the voluntary sector. Collectively the total income of the Scottish voluntary sector is £1.8 billion, which is 5% of GDP. However it should be noted that 67% of Scottish charities have an income of less than £25,000 per year. (SCVO, 2004)

This briefing:

- briefly describes the history of charities in the UK
- discusses the policy background to and the various developments in charity law in Scotland prior to the introduction of the [draft Charities and Trustee Investment \(Scotland\) Bill and consultation document](#), including developments in England and Wales
- looks at the current legislative framework governing charities
- briefly describes the Bill by part
- discusses how the Scottish bill differs significantly from the draft bill for England and Wales

A brief history of charities in Britain

Charities have enjoyed special legal status in Great Britain for centuries. Moody (1999) notes that as early as the 12th Century philanthropists were using the legal tool of a trust to donate money to the poor. Generally, the state was keen to support charitable giving and in 1799 charities were granted exemption from taxation in order to aid their development. By the 19th Century charities were a key force in social change, as Moody (1999) discusses:

“They were the major providers of social services, the pioneers of innovation in social welfare provision and vigorous campaigners on a wide range of social and cultural issues...” (1999, p 2).

The advent of the Welfare State in the 20th Century was not greeted with enthusiasm by many of the larger charitable organisations. Welfare services and benefits were seen as not only a threat to the power and status of charities, but also as a weakening of the fundamental belief in individual reliance.

Yet the Welfare State did not lead to the decline of the charitable sector in Britain. Indeed, the second half of the 20th Century saw an expansion in the charitable sector, accompanied by an expansion in the services supplied – from pressure and self-help groups to environmental conservation groups. According to Moody (1999), in the 1980s and 1990s charities came to the fore once again as the Conservative Government of the time, influenced by the philosophy of the “New Right”, adopted policies aimed at rolling back the boundaries of the state and, instead, advanced the idea that benevolence and individual responsibility would be key to the development of an entrepreneurial society. The charity sector has therefore grown substantially in Britain in recent years, and given the current support of the sector from the UK Government and Scottish Executive, it is not expected that its influence will diminish.

Policy background to Charity Law reform

“The McFadden Report”

In May 2001, after a year of consultation and deliberation, the Scottish Charity Law Review Commission (‘the McFadden Commission’) published its [report](#) into charity law reform. This was followed by the Scottish Executive’s response in December 2002: [Charity Regulation in Scotland – The Scottish Executive’s response to the report of the Scottish Charity Law Review Commission \(McFadden\)](#).

England and Wales

In September 2002, the Cabinet Office’s Strategy Unit in Whitehall (‘the Strategy Unit’) published its report [Private Action, Public Benefit – A Review of Charities and the Wider Not-For-Profit Sector](#). Whilst this dealt largely with charity law as it applies to England and Wales, it did have an impact on Scotland, given that charitable status for tax purposes is overseen by the Inland Revenue for the whole of the UK.

The UK Government announced in the Queen’s speech on 26 November 2003 that it would publish a draft Charities Bill. The UK Government decided that that Bill should be subject to pre-legislative scrutiny by a Joint Committee of the two Houses of Parliament. The Committee reported their findings to the UK Parliament on 30 September 2004. The Draft Bill and the Joint Committee’s report can be found [here](#).

The Scottish Executive’s approach

Following the case of Breast Cancer Research (Scotland) where the Scottish Charities Office took legal action against the charity in 2003 after an investigation found evidence of misconduct and mismanagement, the Executive made a [statement](#) on May 28 2003 outlining their intention to reform Charity Law with the introduction of a bill sometime in 2004. Between December 2003 and May 2004 the Executive held seven meetings with the [Bill Reference Group](#) which was followed in June 2004 with the publishing of the [draft Charities and Trustee Investment \(Scotland\) Bill and consultation document](#). The consultation attracted a significant response with over 260 individuals and organisations responding. These [responses](#) were published on 25 August 2004.

The legislative background of charity law in Scotland

The legal position of charities in Scotland is different from England and Wales, and indeed from Northern Ireland, though the latter is closer to the Scottish position. In England and Wales there has been a legal definition of charity since 1601, and charity commissioners were created in 1853, with responsibility for the registration and monitoring of charities. Their powers, together with other provisions regarding charities, were extended by the Charities Acts of 1960, 1992 and 1993.

In Scotland there was no comprehensive supervisory or regulatory system governing charities until the passage of the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c 40)* (‘the 1990 Act’) though it should be noted that this was not an attempt to bring Scotland into line with England and Wales. Prior to the 1990 Act, as Moody (1999) states, there was a “laissez faire” approach to charity regulation in Scotland:

“Any organisations operating in Scotland could call itself a charity provided it did not seek the tax advantages derived from charitable status. There was no set format for charitable accounts, except where a particular format was required under the charity’s constituting document or as a result of its legal form (for example, limited companies).” (1999, p 7).

Because of this deregulated approach there was also no real requirement in Scots law for a legal definition of what a charity was. Yet as indicated by Moody, above, the English and Welsh legal definition of a charity was adopted across the UK in order that charities could qualify for tax exemptions from the Inland Revenue. This was confirmed in a case about taxation in 1891, *Income Tax Special Purposes Commissioners v. Pemsel*. In England and Wales this meant that a charity could qualify for both tax exemptions and registration by the Charity Commissioners. In Scotland it resulted in a legal definition of what a charity is where there had not previously been one. However, unlike the position in England and Wales, the definition was not linked to the work of a regulatory body.

The definition of “charity” used by the Inland Revenue is based on the *Statute of Charitable Uses*, passed by the Westminster Parliament in 1601, as amended by case law. A charity has to prove that its work falls within at least one of these four purposes:

- the relief of poverty
- the advancement of education
- the advancement of religion
- other purposes beneficial to the community

It has been argued that such a definition is outdated and contrary to the traditional view of charities in Scotland (McFadden Commission, 2001; Moody, 1999; CRU, 2000). However, by the 1980s the concern was not so much with definitions as with the lack of charity regulation. As Moody (1999, p 7) describes, there were three main reasons for this:

- the need for government to scrutinise the increasing levels of public expenditure going to charities resulting from their increasing role in service delivery
- concerns raised by umbrella organisations and charities themselves regarding the differences in pay and conditions of people employed by charities
- the perceived unhappiness of the general public about the lack of accountability of charities

This resulted in Part 1 of the 1990 Act.

The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 c40

The 1990 Act came into force in July 1992 and was quickly followed by the *Charities Accounts (Scotland) Regulations 1992* which came into effect in September of the same year. Barker et al (1996, p 17–19) note that the main aims of this legislation related to accountability, supervision and charity management.

Accountability

The 1990 Act sought to ensure that Scottish charities were publicly accountable, by providing readily available information about the activities of charities to the general public, though it did not introduce a public index or register of charities. Prior to the 1990 Act such information could not be obtained as it was impossible for the Inland Revenue to advise whether or not an organisation had charitable status for tax reasons, because the Inland Revenue had a statutory duty to keep such information confidential.

Supervision

Prior to the 1990 Act there was no general power to investigate cases of wrong doing, though the Inland Revenue could investigate alleged instances of tax irregularities and the Court of Session has certain powers to investigate alleged wrong doing where a charity takes the form of a trust. The 1990 Act gave the Lord Advocate more powers to monitor and investigate charities.

Charity management

The 1990 Act made it an offence for individuals to manage or control charities if they had unspent convictions for an offence involving dishonesty or were undischarged bankrupts. However, the Lord Advocate was also granted the power to waive any such disqualification.

THE CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) BILL

This part of the briefing will describe briefly the main sections in each chapter of the Bill. A more detailed analysis will follow in subsequent briefings.

PART 1 – CHARITIES

Part one of the Bill consists of 10 chapters including the establishment and powers of the Office of the Scottish Charity Regulator (OSCR); the public benefit test; the creation of a new incorporated form for charities; designated religious charities, and the duties of Charity Trustees.

Chapter 1 – Office of the Scottish Charity Regulator

The Chapter establishes OSCR as a statutory body corporate, sets out its general functions, and places it under a duty to produce an annual report.

Chapter 2 – Scottish Charities Register

The Register

OSCR will be obliged to set up and maintain a register of all charities in Scotland. This register is expected to be publicly available on OSCR's website, and will include a number of details about a charity including the purposes of the charity and whether or not it holds designated national collector status for fundraising purposes. Section 3 (4) allows for some information held by OSCR to be excluded from the public for safety and security reasons.

The Charity test

Both the McFadden Commission and the Cabinet Office Strategy Unit recommended that all charities should operate for the public benefit. As the law currently stands three charitable purposes are presumed to be for the public benefit; the relief of poverty and the advancement of education or religion. This presumption will be replaced by a two-part charity test. The first part is a list of 13 charitable purposes, within which a charity must be able to categorise itself, and the second is a separate public benefit test.

This is a significant step which will impact on those charities which have previously been presumed to operate for the public benefit under the three heads of the relief of poverty or the advancement of religion or education. All charities must now prove that they satisfy the set criteria.

References to charitable status

All charities who are registered with OSCR will be able to refer to themselves as “a charity”; “a charitable body”; “a registered charity”; or “a charity registered in Scotland”. (Scottish Parliament 2004a, Section 13 (1)) However some charities that are not registered in Scotland can still call refer to themselves as charities in Scotland if they are a registered charity in another country, managed or controlled wholly or mainly outwith Scotland as long as they do not occupy any land or premises in Scotland or carry out activities in any office or shop in Scotland. (Scottish Parliament 2004a, Section 14 (b)) This is to allow charities who may have members in Scotland or provide funding to Scottish bodies but do not operate in or from Scotland the option not to register with OSCR.

Chapter 3 – Co-operation and information

Co-operation

OSCR will be obliged to seek to secure co-operation between relevant regulators. These could be the Charity Commission in England and Wales, the Care Commission, or Communities Scotland. The intention is to reduce the burden on charities when producing the required information by trying to co-ordinate similar information requests in a common format. (Scottish Parliament 2004b, para 33)) The Executive is hoping that Westminster will place similar duties on UK regulators to disclose information to OSCR.

Charities are also obliged to comply with any reasonable request for a member of the public to have access to their constitution and/or accounts. The charity will retain the right to make a charge which covers the cost of providing that information.

Chapter 4 – Supervision of charities

OSCR will have powers to investigate any charity, as well as any body controlled by that charity. For example this will allow OSCR to look into the activities of a non-charitable trading arm of a charity.

Section 31 outlines the powers OSCR has following enquiries which have shown misconduct. These include suspending anyone concerned in the management of the charity; ordering the charity to cease representing itself as a charity; limiting the financial transactions of the charity; or freezing its bank account. However any sanction can only be applied for a maximum of six months before OSCR would have to apply to the Court of Session to extend any action. (Scottish Parliament 2004b, para 35) OSCR will also have the option of delegating its functions to other relevant regulators. (Scottish Parliament 2004a, Section 36(1))

Powers of the Court of Session

Section 34 outlines the powers of the Court of Session. These are very similar to those of OSCR but without any time constraints. OSCR can also apply to the Court of Session to take action against UK charities based outwith Scotland if that charity holds moveable assets in Scotland.

Chapter 5 – Reorganisation of charities

This chapter is intended to make it easier for charities to amend their constitutions without having to apply to the courts. At present trust law requires that this step is needed to protect the views of the trustees if a charity’s constitution does not specifically allow changes. Charities will now be able to apply to OSCR for any amendments. (Scottish Parliament 2004b, para 37)

Chapter 6 – Charity accounts

This chapter proposes that accounts are kept by all charities, are independently examined or audited, and are sent to OSCR. Section 45 introduces a proportionate regime which will allow Ministers to detail through regulations what information will be required for different sized charities.

Chapter 7 – Scottish charitable incorporated organisations (SCIOs)

This part of the Bill introduces a new legal form for charities to take on corporate status, and to limit liability for their members. SCIOs will be regulated by OSCR, and much of the detail will be produced by Ministers via subordinate legislation.

Chapter 8 – Religious Charities

The bill introduces “designated religious charities”. This type of charity will be relieved of some reporting and accounting procedures, but will still have to pass the charity test to prove that it operates for the public benefit. The criteria which must be met for a charity to receive this status include—

The charity must have—

- the advancement of religion as its principal purpose
- been established in Scotland for at least three years
- a membership of at least 3,000 people aged 16 years and over and resident in Scotland
- an internal governance structure

Chapter 9 – Charity trustees

The duties and liabilities of charity trustees are set out in this part of the Bill. A charity trustee must act in the interest of the charity while exercising their functions. They must also ensure that the charity acts in a way consistent with its purposes, and acts with care and diligence. A charity trustee is guilty of misconduct if they breach these duties.

Section 66 outlines when charity trustees can be remunerated. The amount will be stipulated in a written contract and be reasonable in the circumstances. Further conditions attached to remuneration of trustees for service provision are that a minority of the trustees on the board are party to a written agreement permitting such a provision; and that the charity trustees were satisfied that such an agreement would be in the best interests of the charity.

Section 68 details the circumstances when a person is barred from being a charity trustee. This includes where they have been convicted of an offence involving dishonesty or any offence under this bill.

Chapter 10 – Decisions: notices, reviews and appeals

This chapter introduces a three-tier appeal system against OSCR’s decisions. The first is that any body affected directly can ask for an internal review of that decision; the second stage is the original decision is considered by the Scottish Charity Appeal Panel; and finally the appellant has recourse to apply to the Court of Session. The Scottish Charity Appeal Panel will consist of three persons appointed by the Scottish Executive.

PART 2 – FUNDRAISING FOR BENEVOLENT BODIES

Control of fundraising

The Bill allows for a self-regulatory scheme for fundraisers, with a power in section 82 for Ministers to further regulate the industry if they feel that self-regulation is not being effective.

The Bill gives benevolent bodies, and OSCR on behalf of charities on the Scottish Charity Register, powers to prevent unauthorised fundraising. The Bill makes it unlawful for a professional fundraiser to solicit or collect money without a written agreement between itself and the body it is collecting for. Ministers will, by regulation, stipulate exactly what will constitute the “prescribed requirements” of the written agreement. Regulations will be able to place a duty on fundraisers to inform potential donors of their status and remuneration arrangements.

Public benevolent collections

Public benevolent collections will continue to be licensed by local authorities under the Bill. The local authority can stipulate certain conditions on the collection, including the time, method and location of the collection or refuse it on a number of grounds.

Designated national collectors

OSCR will have the powers to designate a charity as a “designated national collector” if it adheres to criteria set by OSCR. The organisation will then be able to inform local authorities up to 18 months beforehand to hold a collection provided they give the local authority 3 months notice. Local Authorities may only refuse these collections on the grounds of public inconvenience.

PART 3 – INVESTMENT POWERS OF TRUSTEES

This part of the bill implements the recommendations of the Scottish Law Commission to widen the powers of investment of trustees of Scottish trusts. The Scottish Executive claims that the changes will benefit trusts in Scotland by enabling them to invest assets of the trust in areas which may produce a higher return than those they are restricted to at present. (Scottish Parliament 2004b, para 93)

MAJOR DIFFERENCES BETWEEN THE SCOTTISH BILL AND THE DRAFT UK BILL

It should be noted that the UK Bill considered here is a draft bill which has not been formally introduced at the time of writing. The content of the Bill has therefore been considered along with the recommendations of the Joint Committee tasked with the pre-legislative scrutiny of the draft Bill in an effort to ascertain the likely content of the Bill as introduced.

This part of the briefing looks at how the proposals in England and Wales, as outlined in the draft Charities Bill and the recommendations of the Joint Committee, differs from the Scottish Bill in four areas—

- charitable Purposes and Public Benefit
- regulation and Compliance Costs
- independence and Governance
- fundraising

Charitable Purposes

The Scottish Bill and the UK draft Bill differ both in the number of charitable purposes, as well as differing in emphasis on a number of the purposes.

- Purpose (e) in the Scottish Bill gives “the advancement of civic responsibility or community development” as a purpose, where the draft UK Bill cites “the advancement of citizenship or community development”.
- The Scottish Bill also includes “culture” explicitly in (2)(2)(f) whereas the draft UK Bill omits it leaving only heritage, arts or science.
- The most significant difference is that the Scottish Bill divides the draft UK Bill’s (2)(2)(j) where it cites “the relief of those in need, by reason of youth, age, ill-health, disability, financial hardship or other disadvantage” (House of Lords, House of Commons, Joint Committee 2004, pg 18) into the following two parts—
 - “the provision of accommodation to those in need of it by reason of age, ill-health, disability, financial hardship or other disadvantage”; and
 - “the provision of care to the aged, people with a disability, young people or children.” (Scottish Parliament 2004a, Section 7(2))

Further to their deliberations and evidence taking on the draft Bill, the Joint Westminster Committee recommended a number of revisions to the section on charitable purposes in the draft Bill. These were—

- **We recommend that the draft Bill includes a definition of religion in clause 2 making it clear that non-deity and multi-deity groups can satisfy the definition of 'religion' for charitable purposes. Any organisation would still be subject to the requirement of showing public benefit before it could attain charitable status.**
- **We recommend that an additional charitable purpose be added to 2(2) for "the provision of religious harmony, racial harmony, and equality and diversity".**
- **We recommend that the new charitable purpose on "the advancement of arts, heritage and science", should include the word "culture" to bring it in line with the wording of the draft Charities Bill and Trustee Investment (Scotland) Bill.**
- **We recommend that "the saving of lives" be added to the new charitable purpose of the advancement of health.**
- **We recommend that the draft Bill be amended by adding to the general 'any other purposes' category, the words 'or within the spirit or intent of the [11 specific] purposes' listed in clause 2 (2) above.** (House of Lords, House of Commons, Joint Committee 2004, page 18)

Public Benefit

Both the Scottish Executive and the Joint Committee are in agreement that the presumption of public benefit be removed for all of the charitable purposes. To date organisations who have adhered to the charitable purposes of the relief of poverty and the advancement of education and religion have been presumed to be for the public benefit. However this will be replaced with

providing research and information services to the Scottish Parliament

a two-part test where an organisation has one or more of the charitable purposes, as well as being able to demonstrate that it provides public benefit.

The Joint Committee had conflicting evidence on how effective this change would be in practice, with particular regard to those organisations who are currently fee-charging charities. The issue concerned the use of common law in England and Wales. The Charity Commission in evidence (House of Lords, House of Commons, Joint Committee (2004, pg 22) said that the removal of presumption would not have any real effect as the test of public benefit would still have recourse to case law and if a charity had been deemed a charity by the courts then this bill would and could not change that decision. However the Home Office disagreed in that interpretation of the bill maintaining that the public benefit criteria would be applied to all charities, even if they have had their charitable status addressed by the courts. To clarify the situation the Charity Commission and the Home Office issued a [joint statement](#) which is discussed below in relation to how public benefit is defined.

One of the principle concerns in this part of both the Scottish and UK Bills is the issue of how public benefit should be determined. The options in both draft bills have been threefold—

- whether the concept should be defined on the face of the bill; or
- whether non-exclusive criteria should be on the face of the bill and the regulator will decide if an organisation meets that criteria; or
- whether guidance should be produced by the Executive or Government to be used by the regulator.

In Scotland the option of providing broad principles on the face of the Bill has been adopted, leaving the decision on the application of the principles to the regulator in each case, with ultimate recourse to the courts. These are as follows—

(2) In determining whether a body provides or intends to provide public benefit, regard must be had to—

(a) How any—

(i) benefit gained or likely to be gained by members of the body or any other persons (other than as members of the public), and

(ii) disbenefit incurred or likely to be incurred by the public,

in consequence of the body exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence, and

(b) whether benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit is unduly restrictive. (Scottish Parliament 2004a, Section 8)

These criteria have been decided after the consultation exercise as well as trying to ensure that the principles are not significantly different from those expected to be eventually adopted in the UK bill as the Inland Revenue will decide on tax relief based on the Home Office definition. (Scottish Parliament 2004b, para 29)

- For the draft UK Bill the Charity Commission will continue to look at public benefit on a case-by-case basis, again, with recourse to the courts. However with particular regard to fee-charging charities the [joint statement](#) from the Home Office and Charity Commission on this issue clarified the position using the principles indicated by the court in the case of *Re Resch*.¹ (House of Lords, House of Commons, Joint Committee 2004, page 18) These are as follows—
 - a) both direct and indirect benefits to the public or a sufficient section of the public may be taken into account in deciding whether an organisation does, or can, operate for the public benefit;
 - b) the fact that charitable facilities or services will be charged for and will be provided mainly to people who can afford to pay the charges does not necessarily mean that the organisation does not operate for the public benefit; and
 - c) an organisation which wholly excluded poor people from any benefits, direct or indirect, would not be established and operate for the public benefit and therefore would not be a charity.

The Joint Committee recommended that these principles be adopted by the UK bill.

Regulation and Compliance Costs

Functions and objectives of the regulators

The general functions of OSCR are set out in section 2 of the bill and outlined as follows—

- (a) to determine whether bodies are charities,
- (b) to keep a public register of charities,
- (c) to encourage, facilitate and monitor compliance by charities with the provisions of this Act, and
- (d) to identify and investigate apparent misconduct in the administration of charities and to take remedial or protective action in relation to such misconduct.

However the UK bill differs from the Scottish Bill in a number of ways—

- it has included an additional function to give advice or to make proposals to a Minister of the Crown regarding functions or objectives; and
- in addition to the functions of the Charity Commission, it has a full section outlining the following 4 objectives—
 - the public confidence objective is to increase public trust and confidence in charities
 - The compliance objective is to increase compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities

¹ *Re Resch's Will Trusts* (1969) 1 AC 514

- The social and economic impact objective is to enable and encourage charities to maximise their social and economic impact
- The accountability objective is enhance the accountability of charities to donors, beneficiaries and the general public (Draft Charities Bill, Section 5)

Proportionality

One of the key issues regarding the regulation of charities is proportionality. In this respect the UK Bill differs from the Scottish Bill in a number of areas. The first area concerns when an organisation will be subject to the full powers of the regulator. The UK Bill proposes a threshold in section 7 of the draft of £5,000, below which an organisations is not required to register with the regulator. For accounting and audit purposes, a threshold of £500,000 income or £2.8m in assets is being proposed, with organisations with an income of between £250,000 and £500,000 being required to have an independent examination.

In Scotland provisions in sections 45 and 46 of the bill will give Ministers the powers to introduce a proportionate regime of accounting. Although it is not clear at present if there will be a threshold for registration at all, as at present all charities in Scotland are required to register with OSCR, the threshold in the UK Bill for auditing and accounting purposes is considered inappropriately high for Scotland.(OSCR, 2004 p.9) The proposed accounting regulations will also be “more compatible with the Statement of Recommended Accounting Practice (SORP) for charities” as at present “there is little correlation between the current statutory charity accounting regime and the SORP.” (Scottish Parliament 2004b, para 41)

Cross border registration

An area which has caused some concern to UK wide charities is that charities registered with the Charity Commission will also be required to register in Scotland with OSCR if they operate in Scotland, whereas there is no requirement for a Scottish Charity to register with the Charity Commission in England and Wales. Following the consultation exercise the Executive have decided that organisations may refer to themselves as a charity in Scotland if they do not—

- (i) occupy any land or premises in Scotland, or
- (ii) carry out activities in any office, shop or similar circumstances in Scotland,
and
- (c) in making that reference, it also refers to be being established under the law of a country or territory other than Scotland.

The Executive has also made clear that there will be no requirement for a UK charity which is registered with both OSCR and the Charity Commission to prepare separate accounts in each jurisdiction. (Scottish Parliament 2004b, para 59)

Independence and Governance

The issue of charities and trustees independence comes in two forms; firstly that of the regulators independence; and secondly the independence of the trustees from external control. In the first of these issues the UK and Scottish Bills differ. The draft UK Bill has as one of the functions of the Charity Commission that “the functions of the Commission shall be performed on behalf of the Crown.”(Draft Charities Bill, Section 4) The Scottish Bill has not included a similar function. It should be noted that the Joint Committee have recommended that this be replaced with a statement that the Commission shall be a body independent of government. (House of Lords, House of Commons, Joint Committee 2004, pg 51)

On the second issue the Scottish Bill does not however exclude charity trustees from being appointed by either central or local government. It considers as sufficient the safeguards of section 65 where the trustees are obliged to act in the best interests of the charity and its purposes. An additional part is included in the charity test which stipulates that a charity's constitution does not expressly permit a third party to direct or control its activities.

Fundraising

Both the Scottish Bill and the draft UK Bill have adopted an approach of allowing the self-regulation of the fundraising sector with a reserve power for the government to impose regulation if necessary. This approach, as recommended by the Strategy Unit's Report (2002) [Private Action, Public Benefit – A Review of Charities and the Wider Not-For-Profit Sector](#), was further detailed by the Institute of Fundraising's report following the [Buse Commission's report](#) in early 2004. The report outlined the proposed framework and governance structure of a self-regulatory scheme.

The other key issue in the fundraising part of the bill regards benevolent collections. Both bills take the similar approach of requiring bodies to gain local authority permission to collect in a public area. Another issue where both bills take the same approach is in ensuring that the public are aware if the organisation collecting are volunteers or professional fundraisers. The detail of how this will happen is still to be finalised and will be introduced through regulations.

CONCLUSION

The Communities Committee has been designated lead committee for the consideration on the Charities and Trustee Investment (Scotland) Bill at Stage 1. During this Stage the Committee will take oral evidence from a variety of organisations beginning in December until February 2005. It will also issue a general call for written evidence which will be considered alongside the oral evidence in the drafting of the Stage 1 report.

As mentioned in the beginning of this briefing there will be a further series of briefings intended to offer a more detailed analysis of different parts of the Bill. These will be produced to coincide with the Communities Committee's consideration of the Bill. It is therefore envisaged that the first will be produced in December, while the remaining two will be published in January 2005. The briefings are likely to cover *The Charity Test; Regulation, Compliance Costs and Fundraising; and Independence and Governance*.

SOURCES

Barker CR et al. (1996) *Charity Law in Scotland*. Edinburgh: W Green/Sweet and Maxwell.

Buse Commission. (2004) *The future of self-regulation in charity fundraising*. London: Buse Commission. Available at:

[http://www.busecommission.org.uk/public/docs/Buse Commission Phase 2 Report.pdf](http://www.busecommission.org.uk/public/docs/Buse%20Commission%20Phase%202%20Report.pdf)

The Cabinet Office Strategy Unit. (2002) *Private Action, Public Benefit: A Review of Charities and the Wider Not-For-Profit Sector*. London: Stationery Office. Available at:

<http://www.number-10.gov.uk/su/voluntary/report/pdf.htm>

Draft Charities Bill (2004): Cm 6199. London: Stationary Office. Available at:

http://www.homeoffice.gov.uk/docs3/charitiesbill_040527.pdf

Draft Charities and Trustee Investment (Scotland) Bill (as introduced) (2004a). SP Bill 32. Edinburgh: Scottish Parliament. Available at:

<http://www.scottish.parliament.uk/business/bills/pdfs/b32s2.pdf>

Draft Charities and Trustee Investment (Scotland) Bill: Policy Memorandum Session 2 (2004b). SP Bill 32-PM. Edinburgh: Scottish Parliament. Available at:

<http://www.scottish.parliament.uk/business/bills/pdfs/b32s2pm.pdf>

House of Lords, House of Commons, Joint Committee (2004) *Draft Charities Bill Report*, HL Paper 167-1, HC 660-1. London: Stationary Office. Available at:

<http://www.publications.parliament.uk/pa/jt/jtchar.htm>

Moody S.R. (1999) *The Regulation of Charities in Scotland* International Journal of Not-for-profit Law 1(4)

Office of the Scottish Charity Regulator. (2004) *Response to Scottish Executive consultation on Draft Charities and Trustee Investment (Scotland) Bill*. Edinburgh: Office of the Scottish Charity regulator. Available at:

<http://www.oscr.org.uk/Docs/Response%20to%20the%20Bill.pdf>

Payne J. and Dewar S. (2003) *Charity Law Reform*, SPICe Briefing 03/26. Edinburgh: Scottish Parliament. Available at:

<http://www.scottish.parliament.uk/business/research/briefings-03/sb03-26.pdf>

Scottish Council of Voluntary Organisations. (2004) *Analysis of Scottish Charities Sector*. Edinburgh: SCVO. Available at http://www.scvo.org.uk/research/reports/Charities_Statistics.pdf

Scottish Charity Law Review Commission. (2001) *Charity Scotland: The Report of the Scottish Charity Law Review Commission*. Edinburgh: Scottish Executive. Available at:

<http://www.scotland.gov.uk/justice/charitylaw/csmr/csmr.pdf>

Scottish Executive. (2002) *Charity Regulation in Scotland: The Scottish Executive's response to the report of the Scottish Law Review Commission (McFadden)*. Edinburgh: Scottish Executive. Available at:

http://www.scotland.gov.uk/library5/justice/mcfadden_response.pdf

Scottish Executive. (2004a) *Draft Charities and Trustee Investment (Scotland) Bill and consultation document*. Edinburgh: Scottish Executive. Available at: <http://www.scotland.gov.uk/consultations/social/dctib-00.asp>

Scottish Executive. (2004b) *Consultation Responses to Consultation on: Draft Charities and Trustee Investment (Scotland) Bill*. Edinburgh. Available at: <http://www.scotland.gov.uk/library5/social/ctisb-00.asp>

Scottish Executive Central Research Unit. (2000) *Scottish Charity Legislation: An Evaluation*. Edinburgh: Scottish Executive. Available at: <http://www.scotland.gov.uk/cru/kd01/scl/scl.pdf>

Scottish Parliament. (2003) *Official Report 28 May 2003*. Col 133–143. Edinburgh: Scottish Parliament. Available at: <http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/archive/or-03/sor0528->