

**Draft Charities and Trustee Investment (Scotland) Bill
Consultation**

CONSULTATION REPORT

The Scottish Executive
December 2004

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Executive Summary

This Consultation Report consists of two main parts. The first part provides a summary and analysis of the written responses received by the Scottish Executive to the public consultation on the Draft Charities and Trustee Investment (Scotland) Bill. The second part contains a summary of the actions and changes made to the Bill by the Scottish Executive as a result of the consultation process.

The Scottish Executive received 262 written responses to the consultation. 223 of these responses were on behalf of organisations and 39 were from individuals.

The majority of responses welcomed the draft Bill and the overall approach it adopted, recognising the need for effective statutory regulation of charities in Scotland in order to support the sector and maintain public confidence in it. Respondents expressed concern that compliance with the draft Bill would place a burden on charities and welcomed proportionate application of the legislation.

Respondents welcomed the creation of a 2-stage charity test and the majority of those commenting on this felt that public benefit criteria should be included in the Bill. Respondents also welcomed the establishment of OSCR as a statutory regulator, its form as a Non-Ministerial Department, its functions set out in the draft Bill and commented on the composition of the OSCR board. There was support for the creation of a publicly available register of charities in Scotland, but concern was expressed that the publication of certain information could have security issues to charities working in sensitive areas.

A number of responses expressed confusion about which bodies would be required to register with OSCR and concern that this could lead to a disproportionate burden on bodies registered and operating in more than one jurisdiction and subject to more than one charity regulator, as well as those covered by other regulators such as Communities Scotland.

There was an overwhelming view in the responses against the term ‘charity steward’ to describe those persons in control of a charity, which the term ‘charity trustee’ being favoured by most. There was also overall support for the steward duties set out in the draft Bill, with a number of respondents commenting that this clarification would help charity stewards to understand more clearly their responsibilities and liabilities, and that charity stewards should be independent. A number of responses expressed concern about the duty in the draft Bill placing responsibilities on professionals.

Respondents also offered support for the powers to deal with wrongdoing in charities set out in the draft Bill. A number of responses raised concerns about the level of personal liability that the draft Bill place on charity stewards and were concerned that they could discourage people from volunteering to be charity stewards. The majority of responses commenting on the appeals provisions offered support for the process in general, seeing them as an improvement on the existing process and welcoming the clear, free appeals route and the creation of the Appeals Panel. Some responses commented that the time limits were very short.

There was widespread support for the provisions contained in the draft Bill and the consultation paper on regulating charity fundraising, with respondents recognising the need for increased regulation of fundraising. A number of respondents welcomed the provisions in

the draft Bill for the regulation professional fundraisers and commercial participators, the powers to prevent unauthorised fundraising and the proposal to introduce limited statutory regulation of fundraising which would operate alongside a self regulation scheme. Responses welcomed the continuation of a local authority led licensing system for public benevolent collections (PBCs), welcomed the inclusion of collections of promises of money as well as cash, and supported the redefinition of public place. A few responses suggested that collections not covered by the PBC provisions, including goods collections, should be subject to a requirement to notify local authorities in advance of intention to collect.

The majority of responses commenting on the reorganisation provisions contained in the draft Bill welcomed the provisions, as did those commenting on the dormant charity accounts provisions. Opinions on the designated religious charities provisions were mixed. Some welcomed the provisions while others felt that religious charities should be subject to the same regulation and reporting requirements as other charities. The majority of respondents who commented on the accounting provisions welcomed the proposals. Responses also offered support for the widening of trustee investment powers and the provisions for Scottish Charitable Incorporated Organisations.

Part 2 of the report highlights the main changes to the Bill as a result of the consultation and the reasoning behind them. These include the inclusion of criteria defining public benefit, a duty on OSCR to perform its duties in a manner that encourages equal opportunities, provision for OSCR to exclude from the register a charity's or charity trustee's address if it could jeopardise security and provision for charities registered elsewhere and with only a minimal interest in Scotland not to register with OSCR. Other changes include the delegation of OSCR's functions to Scottish Ministers in relation to the regulation of Registered Social Landlords, changing references to charity stewards to charity trustees, the expansion of the provisions on Scottish Charitable Incorporated Organisations and the inclusion transitional provisions and of reserve provisions on the collection of goods.

The Scottish Executive
December 2004

Acknowledgements

1. The Scottish Executive would like to thank all those who took time to respond to the consultation on the Draft Charity and Trustee Investment (Scotland) Bill, and all those who attended the road show events, which the Scottish Executive held during the consultation period. Thanks also go to the Charity Bill Reference Group and all those who were involved in the specialist meetings for their assistance in developing the proposals in the draft Bill.

Introduction

2. This report consists of two main parts. This first part provides a summary and analysis of the written responses received by the Scottish Executive to the public consultation on the Draft Charities and Trustee Investment (Scotland) Bill. The second part contains a summary of the actions and changes made by the Scottish Executive following the consultation. The draft Bill and accompanying consultation paper were published on 2 June 2004. The deadline for responses was 25 August 2004.

3. The consultation paper and draft Bill showed how the Scottish Executive plans to improve and strengthen the regulation of charities operating in Scotland in a way that builds on the value that charities bring to Scottish society, and recognises their independence from government.

4. Scotland's 20 000 charities play a vital role in daily life in Scotland. Without charities' knowledge, skill and expertise, Scotland would be much the poorer. The Scottish Executive is committed to supporting and valuing charities and the wider voluntary sector, while respecting the independence of these organisations. Our aim in reforming charity law is to provide a robust, effective and proportionate regulatory system for Scottish charities, which will secure the widespread support and confidence of both the public and the charities sector.

PART 1: SUMMARY AND ANALYSIS OF RESPONSES

5. The consultation paper outlined the main provisions in the bill, and provided background to some of the issues. The paper divided the provisions in the bill into 6 chapters

- 1. Definition of charity
- 2. Establishing a statutory charities regulator in Scotland
- 3. How charities should be governed
- 4. Powers to deal with wrong-doing in charities
- 5. Regulating charity fundraising
- 6. Improving the operating environment for charities

6. It also outlined Transitional arrangements for existing charities, and provided a draft regulatory impact assessment of the proposed reforms. A draft of the proposed Bill itself was also provided for comment.

Responses

7. Almost 1,000 printed copies of the consultation paper were issued and the documents were viewed over 27,000 times via the Executive's web-site. During this period, the Executive held 6 consultation events (a conference and 5 smaller regional seminars and workshops in Dundee, Inverness, Dumfries and Glasgow (twice)). Over 400 delegates attended these events and a summary of the workshop discussions was published on the Executive's website. The Bill team also spoke at several other events organised by the sector to help explain the Bill proposals to those involved with charities.

8. Printed copies of the draft Bill and consultation paper were distributed to charity and voluntary sector networks, professional sector bodies and networks, voluntary organisations, charities, Local Authorities and other public sector bodies, political parties, faith organisations, other key organisations and interested individuals, including those who had responded to previous Scottish Executive consultations on charity law. The draft Bill and consultation paper were also published on the Scottish Executive's website (it is available on <http://www.scotland.gov.uk/Consultations/Closed>).

9. 262 written responses were received to the consultation. 223 of these responses were on behalf of organisations, and 39 were from individuals. Annex A lists those who responded and have given permission for their names to be published. A breakdown by respondents by type of organisation is given in Table 1 below.

TYPE OF ORGANISATION	NUMBER OF RESPONSES RECEIVED
Voluntary sector bodies (including registered charities)	138
Business/Professional sector bodies	37
Local authorities	16
Other public sector bodies	9
Higher education bodies	8
Schools	5
Religious bodies	9
Political Parties	1
Individuals	39

Table 1 – Breakdown of responses by organisation type

10. The written responses to the consultation document for which the Scottish Executive have been given permission to publish have been placed on the Scottish Executive website (<http://www.scotland.gov.uk/library5/social/ctisb-00.asp>) and are available for inspection at the Scottish Executive library. They can be viewed by request by phoning the Scottish Executive Library Information Service on 0131 244 4552.

Findings

11. The majority of responses welcomed the draft Bill and the overall approach it adopted, recognising the need for effective statutory regulation of charities in Scotland in order to support the sector and maintain public confidence in it. There was also considerable support for the 5 key principles of effective legislation – independent, proportionate, accountable, transparent, consistent - which were set out in the consultation paper.

12. A number of respondents expressed concerns, both in relation to specific proposals and more generally, that compliance with the requirements in the draft Bill would place additional burdens on charities. A number of responses commented that it was important that the legislation was applied proportionately in order to minimise this additional burden on charities to ensure that volunteers, donors and potential charity stewards were not put off by onerous administrative requirements and the threat of criminal sanctions. Several also said that charities would need support to help comply with them, and asked who would resource and provide this support.

13. The consultation paper outlined the main provisions in the bill, and provided background to some of the issues. The paper divided the provisions in the bill into 6 chapters. A more detailed analysis of the comments made on each of these chapters, and the provisions in the draft Bill which each covers, is provided below.

1. Definition of charity

14. A total of 188 responses commented directly on the section of the draft Bill and consultation paper on the definition of charity. Responses covered the full range of groups listed in Table 1. There was broad support for the main proposals contained in this section of the consultation paper and draft Bill, including the 2 stage ‘charity test’.

15. Many responses agreed that the definition of charity– both the list of charitable purposes and any definition of public benefit – should be aligned as closely as possible to the English and Welsh definition, since the latter was the definition that would be used by the Inland Revenue for tax purposes, and to assist cross border charities. A number of responses sought clarification of how and when guidance on the ‘charity test’ would be developed.

Charitable purposes

16. There was also support in the responses for the list of 13 charitable purposes included in the draft Bill, welcoming the extension of the current list, and feeling that they provided a reasonably comprehensive list that should help to clarify existing doubts. In addition, a number of responses offered comment on the list and sought clarification on which purposes certain types of body might fall, including a number of detailed suggestions for additions to the list of charitable purposes, including the promotion of volunteering, the provision of recreation and play, the promotion of sustainable development, the provision of funds/grants to registered charities, and a general ‘sweeping up’ provision. One response commented that the draft Bill made no reference to charities recognised under the Recreational Charities Act 1958.

Public Benefit

17. The consultation paper welcomed views on whether the interpretation of public benefit should be left to the regulator, or whether broad criteria should be included in the bill. 99 responses answered this question directly with opinion divided. A number of other responses commented on the public benefit provisions, but it was not clear whether they were in support of, or against, inclusion of public benefit criteria in the Bill.

18. 54 responses supported the inclusion of broad public benefit criteria in the Bill, while 45 responses were against the inclusion of any criteria or definition of public benefit in the bill. Many of those in support of inclusion of public benefit criteria in the Bill recognised the possible constraints of defining it in legislation, but felt that it was necessary in order to provide clarity, to guide OSCR, to ensure consistent and fair approach to the application of the public benefit test and because existing case law is English. A couple of responses highlighted that inclusion in the Bill did not prevent future adjustment or refinement and one suggested that OSCR could be given a power to add new criteria in the future. Those responses against inclusion of any public benefit criteria in the Bill argued that inclusion would not allow sufficient flexibility for the definition to evolve and develop, but recognised that OSCR would need to consult widely on any guidance it published.

19. The consultation paper also asked for views on the public benefit criteria which were suggested in the paper. A number of responses indicated that they were happy with the criteria set out, while a number offered comments on them. SCVO proposed in their response that the public benefit criteria should be that the body has an overriding purpose &

effect which is of public benefit, the benefit is accessible to the public as a whole or to disadvantaged sections, or to develop an exceptional talent not otherwise developed, that the benefit must outweigh harm to the public, that the body either provides direct benefit to beneficiaries or to other organisations which provides direct benefit and that the benefit is not subject to charges or other conditions which exclude a significant section of intended beneficiaries. A number of responses supported SCVO's proposals. The issue of accessibility was seen as important, but a number of respondents voiced concern at the fifth public benefit criteria listed in the consultation paper 'public benefit is not affected by any charge for services providing charges are set at a level that does not exclude or deter substantial proportion of potential beneficiaries' and stressed that charging should not in itself prevent a body from passing the charity test.

20. A small number of respondents asked for clarification on the difference between public benefit and 'community benefit' listed in the charitable purposes, and suggested that the term public benefit should be replaced with community benefit. Other suggestions included amending the criteria so that they stated that public benefit can include spiritual benefit and including guidance on the difference between organisations that provided direct benefit and those that generated it.

21. Although the majority of respondents welcomed the inclusion of a public benefit test as part of the 'charity test', a small number of respondents argued that the presumption of public benefit should not be removed from certain charitable purposes. Respondents also sought clarification on whether existing charities would be required to meet the public benefit test, and urged early release of any guidance.

22. More generally, as well as supporting the public benefit requirement, a number of responses supported the requirement for charities to meet the additional principles set out by the Scottish Charity Law Reform Review Group Commission (McFadden Commission) – that they are independent, non-party political, and non profit distributing, with the suggestion that the draft Bill should state that body should not meet the charity test if one of its purposes is to advance personal gain. A number of responses suggested types of body which they felt should, or should not be allowed to obtain charitable status including independent schools, housing cooperatives, government bodies and bodies opposing animal testing. A number of responses expressed concern at the implications of the charity test for their body/class of bodies.

2. Establishing a statutory charities regulator in Scotland

23. A total of 193 responses commented directly on the provisions in the draft Bill and consultation paper relating to the establishment of a statutory charities regulator in Scotland making them the most commented upon provisions.

OSCR

24. The majority of responses welcomed the creation of OSCR, feeling that an independent statutory regulator would help increase public confidence in the sector and would play an important role in ensuring the effectiveness of any legislation. Local Authorities also commented that OSCR could play a useful role as a first port of call for information or concerns about charities.

25. There was also widespread support for OSCR taking the form of a Non Ministerial Department (NMD), with a general feeling that it would allow the necessary degree of independence from Scottish Ministers. A couple of responses said that they would prefer to see OSCR take the form of a Parliamentary Commission rather than an NMD. One response suggested that OSCR should be renamed the ‘Charity Commission for Scotland’, while another suggested calling it either ‘Charity Scotland’ or the ‘Scottish Charities Office’.

26. The responses offered support for the functions of OSCR which were set out in the draft Bill and the consultation paper. However opinion was split over what, if any, advisory role OSCR should undertake. The majority of respondents offering an opinion felt that OSCR should play the role of both policeman and friend, offering support and advice to the sector as well as undertaking its regulatory role, with some suggesting that the promotion of good practice should be added to the Bill as an additional function for OSCR. Some responses suggested that OSCR’s advisory role should extend further than compliance with the legislation, covering good practice as well, but pointed out that OSCR would need to be clear where compliance with advice was essential in order to meet legislation, and where it was merely good practice. Other respondents, including SCVO, felt that OSCR’s advisory role should be restricted to compliance with the legislation, with guidance on wider good governance issues best left to the sector itself. A couple of professional bodies felt that regulatory and advisory roles should be kept distinct, and that OSCR should focus on its regulatory role.

27. Several responses made the point that OSCR would need to be sufficiently resourced, and use its resources effectively, in order to discharge its duties. A small number of respondents commented that OSCR’s proposed running costs seemed high, and that OSCR should play a reactive, rather than proactive, role in order to keep costs down. Respondents suggested that the Bill should specify that OSCR must act proportionately and following best practice, and that it should be required to publish an annual report and have an equal opportunities statement. Respondents also indicated that transparency and accountability were important, and that OSCR should consult before making any decisions.

28. A number of respondents commented on the provisions for appointing the OSCR board. There was support for a change to the draft Bill to allow existing charity stewards to be members of the OSCR board – experience of the sector was important, and it seemed inconsistent that they were barred from the OSCR board but not the appeals panel. The general feeling was that a declaration of interests and the use of conflict of interest procedures where necessary would address any potential problems that may arise.

29. Several respondents suggested that the OSCR board should encompass a wide range of backgrounds, including voluntary sector experience, professional skills such as law and accountancy, and other stakeholders. The majority of these respondents were happy with the appointments process outlined in the draft Bill as long as the process was transparent. A minority questioned whether Ministerial appointments were appropriate and whether they would allow sufficient independence – a couple of responses suggested that appointments should be made by the Parliament instead. A few responses also suggested that membership of the OSCR board should be unpaid.

The Scottish Charities Register

30. There was widespread support amongst respondents for the creation of a publicly accessible register of charities. One respondent suggested that it should be renamed the ‘Scottish Register of Charities’ since it would contain all charities operating in Scotland, not just those based there. It was also suggested that it should contain a list of defunct charities and bodies removed from the register. A number of responses suggested that the register should be available on the internet.

31. A number of responses raised concerns about the type of information that would be made publicly available on the Register and the possible security issues this could pose to charity stewards and staff of charities working in sensitive areas, and suggested that charities should be able to provide 2 levels of information to OSCR, who should be required to consult on the information they intended to publish. Several responses felt that Ministers should not be able to control the registration process or the content of the register through regulations.

32. A few respondents expressed concern at the potential cost of registering and having to indicate charitable status on all correspondence, although others agreed that each charity should be given a unique number. It was suggested that existing charities should be allowed to keep their current registration number.

33. Several responses suggested that the section on references to charitable status was confusing, and that the number of terms available to charities should be limited. Responses also commented that the term ‘registered in Scotland’ could be confusing since there would be 2 types of body on the register – existing charities which would be recognised, and new bodies which would be registered.

34. A number of respondents commented on the provisions in the draft Bill relating to the protection of assets of charities removed from the register. A couple of respondents welcomed the proposals, while a couple thought that they were complicated and sought clarification on who the provisions applied to and how long they would last. One response said that the beneficiary charity should not be able to apply the assets as it saw fit.

35. A couple of respondents welcomed the name change provisions and a couple expressed concern and suggested that OSCR should not be able to require an existing charity to change its name, or be required to approve the name change of a charity based outside Scotland.

36. There was confusion amongst a number of respondents about which bodies would be required to register with OSCR. The consultation paper stated that all charities operating in Scotland would be required to register, but this was not explicit in the draft Bill and the term ‘operate’ was not defined anywhere and several responses sought clarification of what this would mean.

Dual registration

37. A number of responses agreed with the requirement in the draft Bill for all charities “operating” in Scotland to have to register with OSCR even if they were registered with regulators in other jurisdictions, such as the Charity Commission for England and Wales.

The majority, however, expressed concerns that this requirement could lead to a disproportionate administrative and financial burden on bodies registered and operating in more than one jurisdiction. This was a particular concern for bodies which have only limited activities in Scotland, with a few responses suggesting that it could lead to some charities withdrawing services from Scotland rather than face the burden of dual regulation. A couple of responses felt that this requirement might place a large burden on OSCR.

38. It was suggested that charities registered with the Charity Commission should be allowed to operate in Scotland without registering with OSCR. Several respondents suggested that if dual regulation was necessary, charities registered with the Charity Commission should receive automatic registration with OSCR.

39. There was widespread support for the statutory requirement for OSCR to cooperate with other regulators to minimise the burden of dual regulation, but a number of respondents suggesting that a reciprocal requirement should be place on other regulators. A few responses sought clarification on the relationship between OSCR and other regulators and how this cooperation requirement will operate, including whether returns made to one regulator will be accepted by another and whether the Inland Revenue would accept OSCR's decision on charitable status when granting tax relief. Several responses welcomed the commitment to minimise the burden of dual regulation and the fact that OSCR would not require separate Scottish accounts for UK charities, while a couple questioned how OSCR could investigate a charity if it had not information on its Scottish activities.

40. The majority of concerns related to dual regulation by OSCR and the Charity Commission, although a few responses from Higher Education institutions were concerned about dual regulation with the Scottish Higher Education Funding Council (SHEFC). Several responses were concerned about the heavy burden of regulation already placed on registered social landlords (RSLs), who are regulated by Communities Scotland, and suggested that the Bill should introduce the concept of principal regulator for RSLs registered with Communities Scotland.

Provision of Information

41. A couple of respondents welcomed the provisions regarding the information charities supply to OSCR and OSCR's powers to obtain information were welcomed by one individual. A small number of responses felt that they were too wide, and should be tightened to cover specified documents only.

42. Concerns were raised that the provisions placed a duty on charities to supply certain documents to the public but prevented them from charging for doing so. A number of respondents highlighted that they were currently allowed to charge a reasonable fee for the provision of information to the public and felt that if they were to be prevented from doing so it should be for OSCR to provide copies of charity accounts, annual reports and constitutions instead. They also felt it was inconsistent that the draft Bill allowed OSCR to charge for the provision of information to the public. A handful of responses felt that the requirement to provide information in reasonable formats could be costly because it was very wide, and sought clarification on what formats it would cover.

3. How charities should be governed

43. 179 responses commented directly on the sections in the draft Bill and consultation paper which covered how charities should be governed.

Charity Stewards

44. The majority of these responses offered an opinion on the term ‘charity steward’ which was used in the draft Bill as a generic term to describe those persons in control of a charity, commonly known as a charity trustee. Although some of the respondents agreed with the term ‘charity steward’ there was an overwhelming view against the term, arguing that it does not sufficiently convey the importance of the role, and would lead to confusion and misunderstanding and suggested a number of possible alternatives. ‘Charity trustee’ was by far the most popular term, with respondents feeling that it was well understood, was already used in England and Wales, and would not lead to confusion with trustees under Trust law as long as it was prefixed with ‘charity’. A number of other terms were suggested including charity governor, director, board member, custodian, guardian and manager.

45. A few responses commented upon the definition of charity steward included in the draft Bill. Several respondents felt that the definition was too narrow, and highlighted certain types of charity steward that did not fall under the definition in the draft Bill, including bodies incorporated by Royal Charter and the local committee of a charity’s member group which is a charity in its own right, whilst others thought that the definition should include those in management as well. A couple of respondents felt that the definition should be clarified further. There appeared to be some confusion, with some respondents apparently understanding that use of the term charity steward was being proposed instead of other statutory terms (such as a director of a registered company). In fact there is no intention of stopping the use of the term director, where that is appropriate.

46. A small number of responses queried how these provisions would impact on UK wide charities with operations in Scotland, for example would they need dedicated Scottish charity stewards and what would be the responsibilities and liabilities of UK trustees.

47. A number of respondents welcomed the proposals relating to those who the Bill disqualifies from being charity stewards while only one respondent was completely against the proposals. A number of suggestions were made about additional categories of people who should be disqualified while a handful of responses felt that the disqualification criteria were too broad, and that there should not be an automatic disqualification for offences committed under the Bill, as some were minor. A number of responses felt that OSCR would need to provide guidance on how to test prospective stewards against the criteria, and that OSCR should maintain and make publicly available a register of disqualified people. A couple of responses questioned when OSCR would use their powers to waive a disqualification. Responses also suggested there should be no sanctions against a charity which inadvertently appointed a disqualified person and expressed concern that there was no requirement for charity stewards to undergo Disclosure Scotland checks.

48. A number of respondents commented that paid staff of a charity should not be able to be charity stewards for that charity, while a smaller number felt that staff should be able to be stewards. A few responses from Higher Education institutes raised concerns that some of the

proposals in the draft Bill relating to the appointment of charity stewards and disqualification may not be compatible with existing legislation governing them.

Duties

49. There was also overall support for the steward duties set out in the draft Bill, with a number of respondents commenting that this clarification would help charity stewards to understand more clearly their responsibilities and liabilities. A couple of responses felt that the duties and liabilities were such that many individuals may be deterred from acting as charity stewards, while another couple felt that the duties did not go far enough. Several respondents felt that it would be important to ensure appropriate training and advice was available to charity stewards, that there may be a role for OSCR in this, and that potential stewards should be made aware of the duties and responsibilities before taking up the post

50. The duty which places responsibilities on professionals raised concerns among a considerable number of respondents, who felt that it was discriminatory and may stop many professionals taking up charity steward positions. A couple of responses offered support for this duty, and another couple thought it was reasonable if the person was a charity steward in their professional capacity but not if it was in a personal capacity.

51. A number of additional comments were made in relation to steward duties, many of them quite detailed. A handful of responses suggested that the Bill needed to be clearer about the standard of care expected of charity stewards and that further guidance on the duties would be necessary. A couple of responses queried how these duties would fit with company law.

52. Many of the responses addressed the issue of charity steward independence. Respondents tended to be in agreement that charity stewards should be independent from outside interests, and that this independence was key to maintaining public confidence in the sector. However opinion was split between those who thought that the approach taken in the draft Bill (placing a duty on charity stewards to act in the interests of the charity and not setting out how they may, or may not, be appointed) would ensure independence and those who felt that the Bill needed to go further. Those respondents who supported the approach adopted in the draft Bill agreed that independence of action was more important than the method of appointment, and that any additional regulation relating to the independence of stewards should be done through the development of good practice rather than by including provisions in the Bill to regulate the method of appointment.

Independence

53. Several respondents felt that independence should be explicitly stated in the draft Bill, either in the section on steward duties, or as an additional requirement in the section on the charity test. A number of responses felt that the appointment of charity stewards must be free of outside influence in order to ensure the independence of charities, arguing that the method of appointment was key. A number of responses raised the issue of government involvement in charities. Several said that the Bill should place a limit on the number of a charity's stewards that could be appointed by public bodies, with several of them supporting the McFadden Commission's recommendation that no more than a third of a charity's stewards

should be appointed by government. It was also suggested that the Bill should set a maximum term of office for charity stewards.

54. A few responses raised the issue of public bodies which were charities, with a couple of responses stating that they should not be able to be charities, and some others supporting a review of the charitable status of these bodies. The other responses, some of which were from public bodies and local authorities, raised and sought clarification of the impact of the Bill on these bodies. A couple of responses mentioned the impact that these proposals could have on funders, commenting that funders are often board members.

Remuneration

55. Opinion was split on whether charity stewards should be paid. Some thought that charity stewards should not be paid and were against any relaxation of the law on this, while some thought that stewards should not be paid for normal duties, but should be able to receive remuneration for exceptional work as well as expenses. Several responses suggested that the bill should be amended to allow payment under certain circumstances, similar to those provisions contained in section 27 of the draft Home Office Charities Bill.

4. Powers to deal with wrongdoing in charities

56. A total of 92 respondents commented on the section of the consultation paper and draft Bill relating to powers to deal with wrongdoing in charities. This was the least commented on part of the draft Bill and consultation paper. The responses on this section covered the range of categories of bodies listed in Table 1, although a greater proportion of Scottish and UK wide voluntary sector bodies offered comment on this section than smaller local bodies.

57. The majority of respondents offered support for the proposals in the draft Bill. A number of responses, including a number of those which broadly welcomed the proposals, highlighted areas of concern and suggested ways in which the provisions in the draft Bill could be improved. This part of the draft Bill sets out powers for OSCR and the Courts to supervise charities, and a process for appealing against OSCR decisions, and these are each looked at in more detail below.

OSCR powers

58. The majority of comments on wrongdoing related to OSCR's powers of investigation and supervision. A number of responses, from a range of bodies, directly welcomed OSCR's proposed powers, supporting the strong stance, feeling that greater scrutiny would help improve public confidence in the charity sector and the sector's effectiveness, and that the procedures set out in the draft Bill would speed up the processes of investigation and action. One response directly welcomed the fact that OSCR's powers extend further than registered charities and cover anyone holding themselves out as a charity. The need to ensure that OSCR's powers were used for prompt and effective action was highlighted, and that OSCR would need sufficient resources to allow this. One response expressed concern that OSCR would not have the resources to monitor financial probity effectively, and that they should use random checks to encourage compliance. A number of responses stressed the need for OSCR to adopt a proportionate approach to the use of these powers.

59. A number of responses suggested that the powers in this section of the draft Bill should be extended further. Suggestions included the extension of powers to cover mismanagement as well as misconduct and an extension or removing of the time limit on OSCR's powers – some felt 6 months seemed very short. OSCR's response to the consultation made a number of detailed suggestions including explicitly extending the inquiry provisions to a charity and any wholly or partly owned subsidiary, including provision to allow OSCR to apply to the courts for the transfer of property where a body has been removed from the Scottish Charity Register but has no intention of winding up or dissolving. OSCR also expressed concern that without a time limit on the protection of assets provisions they might be monitoring a non-charity in perpetuity and that OSCR's right to investigate acts of 3rd parties should not be restricted to activities that charity can undertake itself. A few respondents stated that they would welcome guidance on routes for whistle blowing

60. A number of responses commented on the provisions to suspend charity stewards and freeze assets. Concern was expressed at the lack of power in the draft Bill to provide for the ongoing operation of a charity facing suspension where continuation of service delivery was vital to users. Some suggested that OSCR should be able to approve interim arrangements, and that provision needs to be made to allow the payment of staff salaries, bills and other financial obligations until the process had concluded. Concern was also expressed that the powers to suspend charity stewards for what 'appears' to be misconduct, or if they were 'unfit and unable' were too wide and vague.

61. A few respondents queried the procedures OSCR would use for handling complaints about charities, whether OSCR should be required to investigate every complaint, and if not how it would decide whether to investigate the complaint, and the need to be aware of the possibility of malicious claims. A handful of responses thought that OSCR should be placed under a duty to protect the integrity of (and public confidence in) charities who are not being investigated themselves, but who work with other charities that are undergoing investigation.

62. It was suggested that when preparing reports following an investigation OSCR should be required to send a copy to the person the inquiry was about to allow them to read and agree or make comments before publication. OSCR expressed concern in their response that the requirement for reports on investigations to contain no details that could identify individuals might be impossible to avoid, and indeed it might be desirable to identify them where no wrong doing was found. Some respondents suggest that following an investigation where no wrongdoing was found, OSCR should be required to publicly report the outcome in order to help restore public confidence in the body.

63. Responses also raised the issue of investigations of charities which are also registered with the Charity Commission, and expressed concern that a charity could be subject to an investigation by both OSCR and the Charity Commission at the same time. They suggested that the Bill should limit OSCR's powers to their Scottish activities, or that the Charity Commission should address concerns relating to the performance of duties by charity stewards and OSCR accept any ruling. A response also expressed particular concern that the Bill places no limitation on OSCR's powers in relation to the Scottish assets of a UK wide charity.

Liability

64. A number of the responses raised concerns about the level of personal liability that the draft Bill placed on charity stewards. There was concern that there was an over reliance on criminal sanctions which could discourage people from volunteering to be charity stewards. They suggested that criminal sanctions should be saved for the most serious offences and that charity stewards should not be guilty of a criminal offence for innocent mistakes. Several responses suggested that OSCR should have the power to relieve stewards of liability if they acted reasonably and in good faith, and several responses suggested that further clarification of the level of responsibility and conduct was needed.

65. A few responses thought that a blanket provision should be added to the Bill allowing any charity to take out indemnity insurance for its charity stewards where this was not covered in the charity's constitution.

Appeals process

66. Around half the respondents offering comments on the wrongdoing provisions commented on the appeals provisions. Of these responses the majority directly welcomed the appeals provisions contained in the draft Bill, offering support for the process in general, seeing them as an improvement on the existing process and welcoming the clear, free appeals route and the creation of the Appeals Panel. Some of these responses also offered suggestions for improving the draft Bill and raised areas of concern. The rest of those responses offering comments on the appeals provisions offered neither support for, nor support against, the proposals but instead highlighted areas of concerns or suggested improvements that could be made to the bill.

67. A number of respondents commented on proposals for the Appeals Panel. A few suggested that the Appeals panel should have powers to award compensation, and that being unable to do so may work to the detriment of smaller charities. Other suggestions included fast-track access to the Panel, publication of Panel decisions, allowing OSCR to refer matters to the Panel for clarification and the inclusion in the draft Bill of a timescale for the Panel to confirm/quash/remit a decision.

68. One voluntary sector body commented that the composition and powers of the panel would be important, with another highlighting the need to ensure the independence of the Panel. Concerns were also expressed about restrictions on access to the Panel to other parties affected by directions against charities or charity stewards, such as relatives and employees or other stewards of the charity.

69. Responses also suggested that the appeals procedure should be able to admit new evidence, that OSCR should pay for judicial factors and that the courts should be able to order OSCR to pay compensation.

70. Some responses commented that the time limits, especially the 14-day limit for OSCR reviews, were very short. One law firm highlighted that court appeals are expensive and that sheriff courts should have jurisdiction over small charities.

71. More generally, responses highlighted the need for costs and timescales to be transparent and fair, and for clear guidance to be provided on the right of appeal.

5. Regulating charity fundraising

72. A total of 130 responses commented on the provisions contained in the draft Bill, and the consultation paper on regulating charity fundraising. There was widespread support across the sectors responding for these provisions, with respondents recognising the need for increased regulation of fundraising, and feeling that the proposals would help achieve greater openness and accountability and increase public confidence.

73. A number of respondents welcomed the provisions in the draft Bill regulating professional fundraisers and commercial participators, including the requirement for them to have agreements which benevolent bodies before fundraising on their behalf and make a statement to potential donors regarding their remuneration. There was also support for the provisions giving benevolent bodies and OSCR (on behalf of registered charities) allowing them to prevent unauthorised fundraising. A couple of respondents suggested that volunteers, as well as professional fundraisers, should be required to obtain a body's permission before fundraising for them.

74. 3 respondents supported the exclusion of paid staff from the duties placed on professional fundraisers. However, several respondents felt that the requirement to make a statement regarding remuneration should be extended to cover all collectors, since the true distinction was between volunteers and those paid rather than between contracted professional fundraisers and charity employees.

75. A few responses welcomed the decision to apply the fundraising provisions to all benevolent fundraising, and not just that for charities, but raised concerns about where responsibility lay for monitoring and taking action if non-charity benevolent fundraising breached any of the legislation.

76. It was suggested that the draft Bill could be clarified further by defining 'benevolent bodies' and 'benevolent and philanthropic purposes' and several Higher Education institutions suggested the Bill should state if provisions applied only to fundraising from the public. A couple of responses suggested that the draft Bill should also address postal and internet fundraising. A small number of respondents felt that the fundraising provisions should be as consistent as possible with those in England and Wales to ensure consistency for UK wide charities and appeals.

Self-Regulation

77. There was widespread support for the Scottish Executive's proposal to introduce limited statutory regulation of fundraising which would operate alongside a self regulation scheme to be run by the sector, with powers in the Bill allowing further statutory regulation if necessary. Those that explained the reasons behind their support felt that this approach would improve public confidence in fundraising, although they felt that any system needed to be allowed time to establish itself, and that a robust scheme, consistent across the UK, was preferable. A number of responses suggested that Scottish Ministers should publish criteria, after consultation, for assessing the success of self regulation with a timescale for action, and highlighted the importance of ensuring the public knew how to complain. There was support for the suggestion made in the consultation paper of a kitemark scheme and a code of

practice. A number of responses indicated that more information was needed on the proposed self-regulation scheme as it was unclear at this stage how it would work. It was suggested that bodies such as SCVO and the Institute of Fundraising would be well placed to establish the scheme and review its effectiveness. A few responses called for public sector funding for the scheme. A handful of responses were against the proposal to allow a self-regulation scheme time to establish itself, feeling that it would allow the system to be abused and that such a scheme could not be independent.

Public Benevolent Collections

78. The Public Benevolent Collection (PBC) proposals were of particular interest to local authorities – all of the 14 local authority responses that covered the fundraising provisions, including COSLA, addressed the proposals in the draft Bill on PBCs. They welcomed the continuation of a local authority led system for licensing PBCs, and supported the improvements made to the existing system. None of the local authorities who responded were against the continuation of a local authority led licensing system. They welcomed the extension of public benevolent collections to include collections of promises of money as well as cash, with one local authority stating that this would help them control collecting activity, which they had received complaints about in the past. A couple commented that although they supported the inclusion of collections of promises of money in the PBC system, it was hard to know and comment on how these would work since the details would be contained in regulations.

79. They also welcomed the redefinition of public place, and felt that this helped to clarify what could be a grey area at the moment, although one suggested that the definition could be tightened and clarified further, and that the use of the phrase ‘any other similar public area’ in the draft Bill could lead to inconsistency between local authorities if it was interpreted differently.

80. Opinion was split in the responses from other organisations and individuals on the inclusion of certain privately owned land within the definition of public place, with some voluntary sector bodies supporting it and some arguing that it was unnecessary and the owner’s permission should be sufficient. A number of them welcomed the proposals for PBCs, the inclusion of collections by all benevolent bodies, not just registered charities, and the inclusion of collections of promises of money - no responses suggested that these collections should not be covered. A few respondents made suggestions about the procedures for licensing promise of money street collections, including assessing site capacity and the PFRA acting as principle licensing application to reduce the burden on local authorities.

81. The Institute of Fundraising proposed in their response that all collecting activity that does not require a local authority licence under the PBC system (such as collections within shops and goods collections) should be subject to a requirement to notify the relevant local authority of the intention to collect, to allow easier distinction between legitimate and fraudulent collecting activities. This proposal was supported by a number of other responses.

82. A number of benevolent bodies supported the exclusion of goods collections from the PBC system. A few welcomed the exclusion of goods collections from the PBC system but proposed a notification system for the collection of goods similar to that suggested by the Institute of Fundraising in order to address concerns over bogus benevolent goods collections. This suggestion was backed by several other responses.

83. A number of respondents raised concerns about the resource implications of extending the current system of licensing benevolent collections, although they found it hard to quantify the impact, and highlighted that they may need extra resources to deal with this. A number of local authorities suggested that it might be helpful if they were able to charge a small administrative fee for processing PBC applications, while a few responses from voluntary sector bodies said that this must not be allowed to happen. Local Authorities also commented that guidance on acceptable levels of expenses for running collections would be helpful – especially in using the power proposed in section 57(6)(c) of the draft Bill allowing a local authority to refuse an application on the grounds that an insufficient amount of the money raised was going to be applied to the benevolent cause. A couple of other respondents were against the use of this power on charities registered with OSCR.

84. A few responses, mostly from local authorities commented on the provisions for Designated National Collectors (DNCs). The majority commenting on this welcomed the provision in the draft Bill allowing DNCs to book collecting slots a maximum of 18 months in advance as they felt this would help to prevent the problem of block booking. The other responses made suggestions to further improve the system. A couple of voluntary sector bodies were unconvinced of the need for DNCs.

85. 2 Local Authorities supported the time limits set in the draft bill in relation to PBCs, while a third felt that further consideration of them was necessary to ensure fairness between local and national organizations seeking ‘prime slots’. A number of voluntary sector bodies suggested that further consideration should be given to the time limits relating to the application process which were set in the draft Bill, particularly those relating to local authority time limits to process applications, and suggesting that the time limits for DNCs and other bodies should be the same (both for applications and local authority decisions).

86. Local authorities felt that the criteria in the draft Bill for grounds for refusing a collection were too narrow, and needed to allow collections to be refused if a certain number of organisations were already collecting that day or if the organiser had a history of poor performance in previous collections.

87. A number of responses from voluntary sector bodies also raised concerns that differing interpretation of the PBC provisions, including the powers allowing local authorities to refuse collections, in the draft Bill by local authorities would lead to inconsistency in their application. Local authorities and some other respondents supported the role of OSCR in this area, suggesting that the provision of guidance and advice would help to ensure that consistency was maintained. Both voluntary sector bodies and Local Authorities recognized the need for guidance to minimise inconsistencies, and some suggested that the Bill should place this as a duty on OSCR.

88. A number of other comments were made by local authorities and voluntary sector bodies in relation to the PBC provisions. A few respondents suggested that local authorities should not be required to undertake background checks or receive accounts after for collections by bodies regulated by another recognised body, such as collections by bodies on the Scottish Charity Register, and this suggestion was supported by a number of other responses. One voluntary sector body welcomed the inclusion of a general funding power in the draft Bill, and suggested that this could be used to help fund the development of an on-line application procedure for PBCs. Other comments included the need for a definition of

‘organiser’, support for the addition of a power allowing local authorities to request documents from benevolent bodies in relation to PBCs, the need for clarification of the monitoring role, the need to define capacity in guidance following consultation and the need for further consultation and guidance on aspects of the system.

Charity Trading

89. The consultation paper set out the background to the Scottish Executive’s decision not to include charity trading within the draft Bill. A number of responses commented on this proposal, with opinion split between those who agreed that trading should not be addressed in the Bill, and those who felt that the Bill should allow charities to undertake trading without the need to establish a separate trading subsidiary. Some of these respondents acknowledged that the issue may be a reserved matter for the Inland Revenue to consider, however it felt that guidance would be useful and it was suggested that the Bill should include a requirement that guidelines should be drawn up. It was also suggested that charities should be able to make their own decision on what form of trading best suited them,

6. Improving the operating environment for charities

90. A total of 175 responses commented on this section of the consultation document.

Re-organisation

91. These provisions were commented on in 40 of the responses with the majority supporting most of the provisions. Some emphasised that mergers or re-organisation should be facilitated if they help improve the public benefit provided. Some respondents welcomed the proposal that OSCR should deal with re-organisation of small charities and that this should be extended to medium charities. It was also suggested that any thresholds that are set should be flexible to allow amendments to keep them in line with inflation. A number of the local authorities that responded queried why the provisions exempted trusts to which section 16 of the Local Government etc (Scotland) Act 1994 applies. It was emphasised that the reason for the re-organisation should be scrutinised carefully. Others were concerned that re-organisation could take place without consultation.

Dormant charity accounts

92. 17 of the responses commented on these provisions with the vast majority welcoming them. A few responses queried how OSCR would decide which charity would receive funds from a dormant account and one suggested that any funds transferred should be distributed through existing grant making bodies.

Designated Religious Charities.

93. 29 respondents commented on these provisions. Opinions on these provisions were mixed. Some welcomed the retention of the principle of designated religious bodies but questioned the change in name. Many of those who supported the fact that provisions with exemptions for religious charities were proposed raised concerns over the level of control that OSCR would still be allowed to exercise over the management of churches, feeling that it conflicted with the Church of Scotland Act 1921. Others felt that religious charities should be

subject to the same regulation and reporting requirements as other charities. Some of those supporting the provisions raised concerns that those bodies that currently hold Designated Religious Body status would be subject to review and questioned whether the review would be ongoing.

Accounts

94. 70 respondents commented on the accounting provisions. The majority welcomed the proposals. Most of the responses felt it was important that the regulation was proportionate both in terms of the size of charities and for those bodies which are regulated elsewhere. Some respondents suggested that OSCR should accept reports prepared for other regulators such as the Charity Commission, Companies House or the Inland Revenue. Some respondents felt that it was important that UK wide charities did not have to provide accounts detailing their Scottish activities separately. However a couple of respondents felt that separate accounts should be prepared.

95. 11 respondents supported the proposal that the accounting regulations should rely on the Statement of Recommended Practice (SORP) however 2 respondents were against this feeling that it would unreasonably increase the regulatory burden on small charities. The Higher Education bodies that responded highlighted that it was important that the Charities and HE SORP are kept as similar as possible. Some respondents commented that accounts should show fundraising costs, but others emphasised that the accounts should not be used to create league tables of those costs.

96. A number of respondents felt that the thresholds for different reporting requirements should be the same as in England and Wales. While they recognised that the thresholds are too high for Scotland at the moment they suggested that transitional provisions should be put in place to allow the thresholds to be harmonised over a period of time.

97. A few respondents suggested that a fines system along the lines of that used in Company Law would be a more effective way of ensuring compliance with reporting requirements than OSCR appointing an accountant. It was also suggested that the sanctions in the draft bill were too harsh.

98. A number of respondents suggested that if charities were to provide accounts to OSCR then OSCR should be responsible for making these available to the public. If charities were still expected to provide this information they should be able to charge a reasonable fee for doing so.

Investment Powers of Trustees.

99. 31 of the responses commented on these proposals. 87% of those supported the widening of trustee investment powers. A quarter of those who responded suggested that trustees should be able to delegate powers to an investment manager. It was also suggested that Scottish charities should be able to invest in Common Investment Funds. One respondent requested that OSCR provide guidance on the form and content of acceptable investments.

Scottish Charitable Incorporated Organisations

100. 89 people commented on the provisions for Scottish Charitable Incorporated Organisations (SCIO). Of these, the majority supported the proposals with only 5 respondents stating that they were against them and questioning whether a new legal form was necessary. Others felt that there was not enough detail in the proposals to be able to comment properly. About half of those who responded wanted to be involved in further consultation on the detailed proposals for SCIOs.

101. A number of those who commented felt that converting to an SCIO should be made as simple and straightforward as possible. Others were concerned that bodies established by Royal Charter and Industrial and Provident Societies should be able to convert to SCIOs. Some respondents welcomed the protection limited or no liability would afford charity stewards, but others were concerned that it might cause them to act rashly. A couple of respondents suggested that it should be mandatory to convert.

102. One respondent queried why SCIOs were being introduced and why they were based on the English models. They felt that more consideration needed to be given to why a new form was needed and suggested that they should be developed alongside the Scottish Law Commission's work on trusts. They commented that there was not enough detail in the Bill to allow charities to reach an informed decision on conversion.

7. Transitional Arrangements

103. Several responses commented that the transitional arrangements in the Bill should explicitly set out that all existing charities on the Inland Revenue's Scottish Index would be automatically transferred to the OSCR maintained Scottish Charity Register until such a time as OSCR reviewed their status. This was felt to be too important to leave to secondary legislation under the Bill. A number of respondents commented that the decision of OSCR to remove charitable status from a body following its review must not be backdated to the commencement of the legislation.

8. Costs

104. A number of respondents expressed general concerns at the potential costs (to charities) of registering with OSCR and complying with the provisions in the draft Bill. A few responses said that it was very hard to quantify the costs of any impact of the proposals as much of the detail would be provided in regulations, and it would be easier to do this once they were available. Very few responses commented any further on the likely costs of the provisions in the draft Bill or on the content of the RIA. A handful of comments were made relating to the costs of OSCR, as detailed in paragraph 27 above. A number of comments relating to the requirement for charities to provide information to the public free of charge were also made (paragraph 42 above). A comment was also made that the funding for OSCR must not lead to a reduction in the amount of financial support offered to the sector.

Conclusions

105. Overall, the response to the proposals in the draft bill and consultation paper was very supportive. The main principles in the proposed legislation were welcomed. Many useful and constructive suggestions were received and it is clear that significant thought, effort and time was expended in responding. Many of the detailed suggestions have been accepted or adapted and have been utilised in developing the Bill further for introduction to the Parliament. The Executive is very appreciative of the input and advice which has been provided. As the Bill is debated during the Parliamentary process, and as the detailed secondary legislation is prepared, discussed and consulted upon, the Bill Team hopes that a similar constructive approach by the sector and all those involved can be maintained.

PART 2: SUMMARY OF ACTIONS AND CHANGES FOLLOWING THE CONSULTATION

106. The consultation process on the draft Bill involved the written consultation, focus groups run by Todd Associates in association with Van Döet Consulting and a series of 6 public seminars for charity sector representatives. The report on the Focus Groups is available on the Scottish Executive website at <http://www.scotland.gov.uk/library5/social/dcbfg-00.asp> and the report by SCVO on the seminars is available at <http://www.scotland.gov.uk/about/UNASS/UNASS/00015300/page70039779.pdf>

107. Partly as a direct consequence of the consultation process and partly as policy thinking on the Bill's provisions has developed, the Scottish Executive has made a number of changes to the Bill. This section of the report discusses these changes. The Executive believes that the Bill has been improved by the consultation process and are grateful to all those that took the opportunity to respond. References to section numbers in this part of the report refer to the Bill as introduced to the Scottish Parliament on 15 November 2004.

1. The Charity Test (Sections 7 & 8)

108. A number of those who responded were concerned that the meaning of the final charitable purpose; "any other purpose intended to provide community benefit" was unclear. It was also suggested that the wording did not allow the flexibility of the current case law which extends charitable status to purposes which are analogous to the current charity heads. The draft Home Office Bill has been drafted to retain this flexibility and the Bill has been amended to reflect this.

109. Many of those who responded highlighted that independence from external control was key to public trust in the sector. The McFadden Commission also included independence as a key feature of Scottish charities. Others agreed with the Executive that it is the actions of charity stewards and their freedom to act independently which is important rather than the way they are appointed. However, given the weight of opinion, an extra test stating that a body fails the charity test if its constitution expressly allows third party control has been added to reinforce the importance of charity independence.

Public Benefit (Section 8)

110. The majority of those who commented on the inclusion of public benefit criteria in the Bill were in favour of doing so but also emphasised the importance of retaining flexibility. The focus groups unanimously supported the test and the inclusion of some criteria but were divided as to how prescriptive they should be. The Joint Committee scrutinising the Home Office Charities Bill also recommended that non-exclusive criteria for determining public benefit were included in that Bill. As a result, broad criteria for interpreting public benefit have been incorporated into the Bill. They are; that in determining whether a body provides public benefit consideration should be given to how any benefit gained by members of the body and any disbenefit to the public compares with the benefit to the public and where the benefit is, or is likely to be provided to a section of the public only, whether any condition on obtaining the benefit is unduly restrictive. These principles cover the 5 criteria set out in the

consultation document and provide a statutory framework for OSCR and Courts to interpret public benefit while allowing the flexibility necessary for the sector to evolve over time. OSCR will still be under a duty to publish guidance on how it determines whether a body meets the charity test.

2. Establishing a statutory charities regulator in Scotland.

OSCR (Section 1 & Schedule 1)

111. Several of the responses suggested that the Bill should place OSCR and charities under a duty to perform their functions in a manner that encourages equal opportunities. As a public body OSCR has certain duties under equal opportunities legislation but it is accepted practice to emphasise this in new legislation. The Bill has therefore been amended to reflect this. The duty has not been extended to charities as this would be outwith competence.

112. While it was implicit in the Bill that OSCR would determine charitable status by entering a body into the Register, a number of respondents thought that this should be explicitly stated. It was also suggested that a specific reference was made to monitoring compliance by charities. OSCR's general functions have been amended to include both these suggestions.

113. The majority of respondents felt that disqualifying charity stewards from serving on OSCR's board unnecessarily denied OSCR access to a wealth of experience and expertise. The Executive agrees and Schedule 1 to the Bill has been amended to remove this exclusion. OSCR will be included in the Ethical Standards in Public Life etc. (Scotland) Act 2002 requiring it to prepare a Code of Practice for approval by Ministers including procedures for dealing with conflicts of interest.

The Scottish Charities Register. (Section 3)

114. A number of respondents to the written consultation and at the events raised concerns about the type of information that would be publicly available on the Register and the possible security issues this would pose for charities working in sensitive areas. A provision has been added to the Bill that allows OSCR to exclude the address of a charity from the Register, on application from the charity, if it believes inclusion is likely to jeopardise security. Charities may choose to use the address of their solicitor or a PO Box address as a contact address if the security of their staff and stewards is an issue.

Entitlement to be given information by charities. (Sections 23)

115. Concerns were raised that the provisions placed a duty on charities to supply certain documents to the public but prevented them from charging for doing so. A number of respondents highlighted that they were currently allowed to charge a reasonable fee for the provision of information to the public and felt that if they were to be prevented from doing so it should be for OSCR to provide copies of charity accounts, annual reports and constitutions instead. The Executive accepts that the current position should continue and Bill has been amended to allow charities to charge for providing information so long as the fee does not exceed the cost they incurred or a maximum fee that Ministers may set.

Dual Registration (Sections 13 &14)

116. The consultation process highlighted the problems which might be caused for charities with only marginal interest in Scotland by requiring all charities operating in Scotland to register with OSCR. There were concerns that this might lead to a disproportionate administrative burden and there was uncertainty over who would have to register. It was felt that if co-operation between the regulators is successful, dual registration would be of little benefit and might over burden OSCR if large numbers of charities in England and Wales decided to register. A general view that the legislation should not be overly bureaucratic was expressed in the focus groups. These concerns have been taken on board and provision has been added to the Bill to allow charities outwith the jurisdiction of the Scottish Courts, i.e. those who do not occupy land or premises in Scotland or carry out activities in any office or shop in Scotland, to refer to themselves as charities in Scotland despite not being listed in the Scottish Charities Register, providing they are entitled to do so. This means that many UK wide charities merely writing to Scottish members will not have to register but will be expected to accurately identify themselves as a charity registered in England and Wales rather than merely as a charity.

Registered Social Landlords (Section 38)

117. Communities Scotland and the Council of Mortgage Lenders argued that charitable Registered Social Landlords (RSLs) should be exempted from regulation by OSCR. The view of the Scottish Federation of Housing Associations was that Communities Scotland should be the lead regulator for charitable RSLs.

118. Communities Scotland argued that the regulatory powers set out in the Housing (Scotland) Act 2001, delegated to the Agency by Scottish Ministers, overlap with the proposed powers of OSCR in several key areas. They particularly highlighted registration and de-registration; purposes; consent to changes to constitutions of RSLs; investigating complaints; obtaining information; accounts; statutory powers of intervention including-making inquiries, appointments to the governing body & the transfer of assets. They agreed that the regulation of the charitable sector was important but felt that charitable RSLs are already subject to a stringent regulatory framework through housing legislation. Ministers were persuaded that requiring charitable RSLs to be regulated by OSCR as well as Communities Scotland would add significantly to the regulatory burden without adding value. The Bill has therefore been amended to allow Scottish Ministers to exercise OSCR's regulatory powers in relation to charitable RSLs. These organisations will register with OSCR but the day to day regulatory functions will be carried out by Communities Scotland. The housing regulator is committed to working closely with OSCR and will ensure that it deals with charitable issues when regulating charitable RSLs.

3. How charities should be governed.

Charity Stewards (Section 65)

119. The Bill proposed a new term to refer to those in control of charities. However the majority of respondents disliked the term Charity Steward feeling it did not accurately reflect the role and responsibilities, a view that was echoed in the focus groups. As a result the Bill

has been amended to refer to Charity Trustees. While this does have some potential for confusion with trustees in trust law, it has the advantage of being in common usage in Scotland already and being compatible with the terminology used in England and Wales.

Duties (Section 65)

120. A number of respondents were concerned by the inclusion of an additional duty for those acting as a charity steward in the course of a business or profession to use any special knowledge and expertise. Many felt that it was unnecessary and might deter people from acting as charity stewards. This was a misunderstanding but the provision has been removed to improve clarity.

Remuneration (Sections 66 & 69)

121. Many respondents considered that charity stewards should be prevented from receiving payment for performing their normal duties but that they should be able to be paid for other services. It was felt that the Bill should address this issue and provisions have been added to the Bill to allow payment of charity stewards only where expressly permitted by their constitution. Payment is also only allowed for normal or other duties where it is considered reasonable and in the charity's interests, is subject to a transparent written agreement and where only a minority of stewards are paid. These provisions are similar to those in the draft Home Office Bill.

Disqualification (Sections 68 & 69)

122. It was suggested in a number of responses that OSCR hold a list of those who are disqualified from acting as a charity steward. Others suggested that as part of the application process to be put on the Scottish Charities Register OSCR should carry out checks on the trustees listed. The Executive felt that it would be impractical for OSCR to know about all those who are disqualified and that charities would be likely to ask potential stewards to declare anything that might disqualify them from acting. Some respondents also suggested that Disclosure Scotland checks be made compulsory for charity stewards. The Executive would expect that if a steward is likely to be working with children or vulnerable people the charity would carry out these checks as a matter of course.

4. Powers to deal with wrongdoing in charities.

123. A number of respondents voiced concerns over the introduction of criminal sanctions by the Bill, particularly in relation to breaches of steward duties. They felt that criminalising charity stewards for what might be a mistake was harsh and would be a disincentive to becoming a charity steward. It was argued that OSCR should seek to help charity stewards address problems, that if they were incompetent they should be removed and current means of dealing with fraud were sufficient. The Executive believes, however, that criminal sanctions are an effective deterrent and OSCR will act in a proportionate manner when deciding to report any breaches. In addition the Procurator Fiscal will, as Master of the Instance, consider whether it is in the public interest before prosecuting any cases.

124. Many people felt that to maintain public confidence in charities OSCR should publish reports on the outcome of all inquiries whether or not any wrongdoing is found. To do this

after all inquiries would be extremely burdensome on OSCR but Section 33 of the Bill has been amended to provide that OSCR must produce a report if requested to do so by the person about whom the inquiries were made.

5. Regulating charity fundraising.

125. As a result of the responses to the consultation and to provide further clarity to the public, the Executive intends to extend the requirement to make a statement to potential donors regarding the fundraiser's remuneration or the amount of funds going to benevolent causes to include employees of benevolent bodies and possibly to volunteers (Section 80).

126. A number of responses suggested that while the Bill was right not to include the collection of goods in the provisions on public benevolent collections they should be subject to notification procedures. The Executive believes that without power to regulate and enforce such a scheme it would be of little practical value. There is no reported significant problem with malpractice in this area at the moment but it was felt that some provision may be required if improper practice develops. As a result, reserve powers (section 90) have been added that allow Ministers to regulate goods collections including requiring prior notification to local authorities of all collections of goods.

127. The Executive has also added a power allowing Ministers to remove the requirement for local authorities to undertake background checks for certain types of public benevolent collection application (section 85). This is intended to reduce the administrative burden on Local Authorities by allowing Ministers to remove the need for background checks on bodies registered with OSCR who apply for consent to make a public benevolent collection.

128. The focus groups highlighted public annoyance with street collections or "chuggers" with about 30% suggesting that they should be banned. This view was not expressed in the written consultation with the majority welcoming the proposals to extend the regulations to include promises of money by direct debit or standing order. The Executive believes that these proposals along with the statement by professional fundraisers on how much of the donation will go to the charity will provide adequate safeguards for the public while allowing charities to continue to use this valuable fundraising tool.

6. Improving the operating environment for charities

SCIOs (Sections 49 -63)

129. The majority of the responses welcomed the creation of Scottish Charitable Incorporated Organisations (SCIOs). There were mixed views on whether there should be limited or no liability for members. The Executive has considered the arguments for and against both and while some felt that removing liability from members could result in charity stewards acting rashly, we believe that limited liability is unlikely to have a significant impact on the behaviour of stewards, especially as the normal level of liability is set at a nominal £1. It was also felt that even with limited liability service providers are likely to ask for additional guarantees. As a result the Bill has been amended to provide that members of SCIOs will have no liability.

130. A number of those commenting on SCIOs emphasised the importance that the process for becoming an SCIO was as clear and straightforward as possible. The provisions of the Bill have therefore been expanded to clarify applications to create an SCIO, conversion to SCIO status and amalgamations of SCIOs. Further detail will be set out in regulations to provide flexibility and allow additional provision as practical experience increases.

Re-organisation (Sections 40 -44)

131. Many of the responses welcomed the proposals for simplifying charity reorganisation procedures. However some felt that the provisions were too complicated and they have been amended to provide that charities not having the power to amend their own constitutions will have to apply to OSCR for approval. This is a significantly simpler system than the original proposal that charities apply either to OSCR, the Sheriff Court or the Court of Session depending on their size. OSCR's decisions will be able to be appealed to the Scottish Charities Appeal Panel and ultimately to the Court of Session. As a result of these changes non-charitable public trusts are no longer covered by the Bill.

7. Transitional arrangements.

132. The consultation document set out the Executive's proposals for transitional arrangements for existing charities to be automatically transferred onto the Scottish Charities Register. A number of respondents raised concerns that there was no provision for this in the Bill. While the majority of the detail of the transitional arrangements will be laid out in regulations a provision has been added to the Bill stating this and expressly providing that OSCR must transfer those currently entitled to describe themselves as a Scottish charity onto the Register. It is still intended that OSCR will carry out a systematic review of the Register to ensure that all charities meet the new definitions.

8. Next Steps

133. The Charity and Trustee Investment (Scotland) Bill was introduced to the Parliament on 15 November 2004 and the Parliamentary process is likely to continue well into 2005. The Executive will continue to work with the sector as well as the Parliamentary committees scrutinising the Bill throughout this process.

134. Much of the mechanics of the Bill will be put into effect through secondary legislation and regulations. The Executive intends to develop these in consultation with the sector during the coming year. Work will need to be done to ensure that we put in place a regulatory framework which is robust, workable and flexible enough to deal with the diversity of the sector without placing undue burdens on charities.

The Scottish Executive
December 2004

List of Respondents who gave permission to publish their name.

4-Consulting Limited
Aberdeen City Council
Aberdeen Cyrenians
Aberlour Child Care Trust
ACCORD Hospice
ACIE (Association of Charity Independent Examiners)
Adam & Company Investment Management Ltd
Alcohol Focus Scotland
Alzheimer Scotland
Animal Concern Advice Line and Save our Seals Fund
Annandale & Eskdale CVS
Argyll & Bute Council
Arthritis Care in Scotland
Association for Charities
Association for International Cancer Research
Association of Charity Shops
Association of Medical Research Charities
Association of Scottish Colleges
Association of Scottish Community Councils
Ayr Housing Aid Centre
Barnardo's Scotland
Bates, Wells & Braithwaite
Bield Housing Association Limited
Blair Charitable Trust
British Heart Foundation
British Red Cross
BTCV Scotland
Cancer Research UK
Capability Scotland
Catholic Bishops' Conference in Scotland
Central Fife Association for Mental Health
Charity Commission
Charity Law Association
Charity Law Research Unit, University of Dundee
Chartered Institution of Building Services Engineers
Children 1st
Children in Scotland
Church of Scotland
CISWO
Citizens Advice Scotland
Clarkston Preschool Playgroup
CLIC Scotland
Colin Liddell
Communities Scotland
Contact a Family Scotland
Co-operation & Mutuality Scotland
CoSLA
Council of Mortgage Lenders
Couple Counselling Scotland

Cultural Commission
CVS Fife
CVS Hamilton/East Kilbride
CVS Perth & Kinross
Danny McPhail-Smith
David Erdal
Denis Mollison
Diocese of Galloway
Douglas Bain
Dr Christine R Baker
Dumfries & Galloway College
Dumfries & Galloway Council
Dumfries Welfare Rights
Dunfermline Sound
East Renfrewshire Council
ECAS
Edinburgh & Leith Age Concern
Edinburgh Tenants Federation
Edinburgh Voluntary Organisations' Council
ELCAP
Erskine Stewart's Melville Schools
Fairbridge in Scotland
Fife Shopmobility Ltd
Forget me not club
Foundation of Science and Technology
Friends of the Earth Scotland
Friends of the Ochils
George Watson's College
Gerald F Morris
Gerrard Ltd
Girlguiding Scotland
Glasgow City Council
Glasgow Council for the Voluntary Sector
Glasgow Housing Association
Gordon Ingram
Gordon M Wyllie
Gregor Campbell
Guide Dogs for the Blind Association
Help the Aged
Henderson Loggie
Hospital Broadcasting Association
Ian J Cowan
ICSA International
Institute Members in Scotland, Institute of Chartered Accountants
Institute of Fundraising, Scotland
Institute of Physics
Institution of Civil Engineers
International Play Association
Inverclyde Council
James M Wallace
John Greenaway
John Norman
Jordans Limited

Keep Scotland Beautiful
Keith Howell
Law Society of Scotland
Learning Link Scotland
Lindsays WS
Lister Housing Co-operative Limited
Lloyds TSB Foundation for Scotland
Macmillan Cancer Relief
Malcolm May
Management Development Network Scotland
Martin Duncan
Mid Argyll Arts Association
Mid-Fife Newstape
Midlothian Voluntary Sector Forum & Midlothian Social Inclusion Forum
Momentum
Motherwell Guild of Help
Mrs Jean Fleetwood
MVSO
National Galleries of Scotland
National Library of Scotland
National Playbus Association
National Trust for Scotland
NCVO
NDCS Scotland
Newton Investment Management
NHS Lothian
Nicholas Ridley
North Ayrshire Council
North Lanarkshire Council
Office of the Scottish Charity Regulator
Orkney Islands Council
Oxfam in Scotland
Pagan Osborne
Paul Graham Windsor
Perth and Kinross Council
Peter Kennedy
PFRA Scotland
Play Scotland
Powerful Partnerships
PricewaterhouseCoopers LLP
Prof. J E McLachlan
Quaker Stewardship Committee
Quarriers
RCA Trust
Reach
Renfrewshire Council
RNID Scotland
RNLI
Robert H Bowie
Rosneath Peninsula Amenity Society
Roxburgh Association of Voluntary Service
Royal Botanic Gardens, Edinburgh
Royal College of General Practitioners

Royal College of Physicians of Edinburgh
Royal College of Physicians of Edinburgh
Royal Institute of Chartered Surveyors Scotland
RSA Scottish Committee
RSM Robson Rhodes
RSPB Scotland
Saheliya
SCOHF (Scottish Community Ownership Housing Forum)
Scottish Cancer Coalition
Scottish Central Branch, National Federation of the Blind
Scottish Charity Finance Directors Group
Scottish Churches Committee
Scottish Civic Forum
Scottish Community Foundation
Scottish Council for Development and Industry
Scottish Council for Voluntary Organisations
Scottish Council of Independent Schools
Scottish Council of Jewish Communities
Scottish Environment LINK
Scottish Episcopal Church
Scottish Federation of Housing Associations
Scottish Funding Councils for Further and High Education
Scottish Grant Making Trust Group (SGMTG)
Scottish Law Agents Society
Scottish Palestine Solidarity Campaign
Scottish Pre-School Play Association
Scottish Railway Preservation Society
Scottish Refugee Council
Scottish Socialist Party
Scottish SPCA
Scottish Spina Bifida Association
Scottish Sports Association
Scottish Women's Aid
SEA Scotland
Sense Scotland
Shelter Trading Ltd
SHERT
Shetland Branch Arthritis Care
Shetland Charitable Trust
Sick Kids Friends Foundation
Society of Arthritics Northern Division
South Ayrshire Council
South Edinburgh Amenities Group
St Margaret's School for Girls
T C Young
T Turbitt
The Brethren
The Celtic Congress (Scotland)
The Churches of God
The City of Edinburgh Council
The Earl Haig Fund Scotland
The Edinburgh Academy
The Independent Services Agency Ltd

The Institute of Chartered Accountants of Scotland
The Institution of Chemical Engineers
The Institution of Structural Engineers (IStructE)
The MacRobert Trust
The Manor Project Limited
The Notre Dame Centre
The Robertson Trust
The Rock Trust
The Royal Environmental Health Institute of Scotland
The Royal Society of Edinburgh
The Salvation Army (Scotland Office)
The Scottish Association for Mental Health
The Scottish Association of Prostate Cancer Support Groups
The Scottish Centre for Children with Motor Impairments
The Scottish Inter Faith Council
The Scottish National War Memorial
The Scottish Out of School Care Network
The University of Edinburgh
The Wellcome Trust
The Wise Group
Thorntons WS
Turcan Connell
Turning Point Scotland
Universities Scotland
University of Glasgow
University of Stirling
Victim Support Scotland
Voluntary Action East Renfrewshire
Voluntary Action West Lothian
Voluntary Arts Scotland
Volunteer Development Scotland
VONEF
West Dunbartonshire Council
West Lothian Council
William G A Stewart, Chartered Accountants
William Gemmill
Woodland Trust Scotland
WRVS
WS Society
Youthlink Scotland
15 further responses from individuals who requested that their names were not published.

The Scottish Executive
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