FINANCE COMMITTEE

AGENDA

34th Meeting, 2004 (Session 2)

Tuesday 21 December 2004

The Committee will meet at 10.00 am in Committee Room 1 to consider the following agenda items:

1. Charities and Trustees Investment (Scotland) Bill: The Committee will take evidence on the Bill’s Financial Memorandum from—

   Anne Swarbrick, specialist in charity law and Associate of Anderson Strathern, Solicitors.

2. Budget Seminar (in private): The Committee will consider a paper by the Clerk on its forthcoming budget seminar.

Susan Duffy
Clerk to the Committee
The papers for this meeting are:

**Agenda Item 1**

Charities and Trustees Investment (Scotland) Bill, Explanatory Notes and Policy Memorandum

SPICe Briefing Note

Written evidence

PRIVATE PAPER

**Agenda Item 2**

PRIVATE PAPER
Charities and Trustee Investment (Scotland) Bill - Financial Memorandum
Written Submissions

1. The Charities and Trustee Investment (Scotland) Bill was introduced in the Scottish Parliament on 15 November 2004. In order to aid the Committee’s consideration of the Financial Memorandum, the Committee will take evidence from Anne Swarbrick, Anderson Strathern at today’s meeting and Scottish Executive officials will give evidence to the Committee at its meeting on 18 January 2005.

2. In addition, written submissions have been received from the following organisations.

- Scottish Council for Voluntary Organisations
- Office of the Scottish Charities Register
- National Galleries of Scotland
- National Museums of Scotland
- Scottish Screen
- Scottish Natural Heritage
- National Library of Scotland
- Royal Botanic Garden
- Scottish Arts Council
- Anne Swarbrick
- Royal Commission On The Ancient and Historical Monuments of Scotland

3. The Committee is invited to consider these submissions.

Emma Berry
December 2004
SUBMISSION FROM SCOTTISH COUNCIL FOR VOLUNTARY ORGANISATIONS

Introduction
SCVO is the representative umbrella body for the voluntary sector in Scotland. Our 1200 members represent a vast constituency covering the majority of charitable activity in Scotland. This submission is endorsed by the elected SCVO Policy Committee, which represents large and small, local, national and international organisations, covering many different fields of activity.

Our lengthy experience of and our close contact with the sector allow us to speak with some authority about the likely impact of the changes upon it as they are laid out in the Charities and Trustees Investment (Scotland) Bill.

Key Issues
We accept that there will be some cost for charities associated with complying with the new provisions of the Bill. We believe that, in general, the benefit to the sector of effective compliance outweighs the impact of any costs. However, we wish to raise the following points:

1) A light-touch monitoring regime and cost effectiveness
The Office of the Scottish Charity Regulator (OSCR) should operate a light-touch monitoring regime in keeping with the grain of the information that the charitable sector already collects. For example, when it comes to accounts the sector is already obliged to produce detailed information and present it in an accessible way. We hope that such a regime is the intention and presumably this is the assumption behind paragraph 149 of the explanatory notes, which suggests there will be no extra costs on the sector in terms of new accounting regulations, which will be generated by an Act.

However the Executive’s intention (paragraph 150 of the notes) is that the Charity Statement of Recommended Practice (SORP) will occupy a much greater position in the presentation of the accounts of Scottish charities than previously. OSCR’s pilot annual return form also uses sections that relate to accounts presented using the SORP. Yet it has been shown by the Dundee University Charity Law Unit in research commissioned by the Scottish Executive that the SORP is scarcely used by all but the largest charities in Scotland. Because the presentation of accounts that follow the SORP can be a complex task it is likely that there will be an increased costs for their preparation for organisations that have not previously required them in this form. It is inaccurate to suggest there will be no cost and we would advocate that the Executive consults with the sector and the accountancy profession to gauge a realistic figure.

SCVO agrees that OSCR must be sufficiently resourced to carry out its appointed tasks. However, the increase in its budget by £1 million per annum does not suggest the provision of the light-touch regime that we believe is both
desirable and possible, especially given the general willingness of the sector to cooperate with OSCR.

OSCR has argued that its proposed detailed questionnaire based approach to the collection of data that is included in accounts – rather than the submission of the accounts themselves - is to reduce the burden on OSCR. While SCVO’s experience of similar data collection demonstrates that the burden won’t in fact be reduced, this position also begs the question as to why the burden of regulation should fall so heavily to charities rather than on the regulator.

OSCR should seek at all times to minimise the bureaucracy required of charities of all sizes and types, allowing the maximum time and resources of charities (and those that work for and govern them) to be devoted to charitable endeavours and not diverted to dealing with red tape. If OSCR establishes a mutually beneficial light touch approach to monitoring that does generate an unnecessary overabundance of information being submitted to it surely OSCR itself will be able to operate in a more cost effective way.

As a new body OSCR is ideally placed to bring together those with experience and knowledge of charity reporting, including representatives of the sector, in order to construct a model of reporting for charities that both gathers truly relevant information and is mutually cost effective.

Rather than increasing the money available to OSCR it may be better spent enabling this process to take place and in resourcing training and governance improvement in the sector (as below).

2) The cost of training for compliance
The Financial Memorandum (paragraph 139) includes an estimate that ‘training seminars to raise awareness of the new legislation amongst charities’ would cost £150,000 for the sector based on £5,000 per 100-delegate event. This would appear to be based on holding 30 events reaching 3000 attendees. It is utterly unclear where the 3000 figure comes from.

We consider that considerably more people would require direct training of the kind described. Given that any shortfall between training costs and available funding would impact upon the sector itself we consider the figure of £150,000 to be wholly unrealistic. A figure ought to be arrived at only after proper consultation with the sector.

Incidentally, it is not quite clear how the acknowledgement of this cost squares with paragraph 156 of the Financial Memorandum which states that there should be no additional costs associated with the duties of charity trustees contained in the Bill.
3) Ensuring good governance
SCVO has, in fact, identified that the need for adequate training in all aspects of governance of voluntary and charitable organisations is now a key priority for the sector. We believe that the new Bill provides an opportunity for the Executive to think beyond compliance costs with respect to the Bill alone and work with the sector and OSCR to plan and deliver a comprehensive programme of good governance for the sector. This will strengthen the sector in Scotland in a way that is absolutely crucial in maintaining and improving its current and future capacity and level of volunteer involvement.

The issues of compliance and good governance costs in general were raised by delegates during both the Executive’s consultation meetings and the Communities Committee pre-legislative meetings with the voluntary sector on the draft Bill.

4) Cost of registration
It is not clear to us how the Executive has arrived at the figure of £2000 used in paragraph 130 of the Financial Memorandum and therefore it is difficult to gauge its accuracy. However, £2000 is a substantial cost by any reckoning and even a charity that might appear to be able to afford it ‘on paper’ might struggle to allocate further resources to administrative requirements, possibly at the expense of delivering on its charitable objectives.

Conclusion
We believe that a more careful and consultative consideration by the Executive of the costs associated with the Bill, taking into account the issues we have raised, will truly help to make this Bill the effective piece of legislation that we all look forward to, one that will ensure a thriving Scottish voluntary sector working for the benefit of Scotland, now and far into the future.

This questionnaire is being sent to those organisations that have an interest in, or which may be affected by, the Financial Memorandum for the Charities and Trustee Investment (Scotland) Bill. In addition to the questions below, please add any other comments you may have which would assist the Committee’s scrutiny.

SUBMISSION FROM THE OFFICE OF THE SCOTTISH CHARITY REGISTER

Consultation
1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

Response
(i) OSCR representatives (Jane Ryder, Chief Executive and Richard Hellewell, Head of Regulation & Compliance) were part of the Bill Reference
Group. In addition, OSCR’s Chief Executive spoke at a number of consultation events organised by the Scottish Executive and participated in others.

(ii) OSCR submitted a full Resource Impact Assessment to the Bill Team, estimating the annual requirements, together with additional “set up costs” to assist in preparation on transition to the new regime. An Executive summary of the RIA is attached.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

Response
The Financial Memorandum accompanying the Bill refers to a budget of £2.3m for 2006/07 onwards (i.e. an additional £1m p.a.), based on historic estimates. However, OSCR has since been able to undertake more detailed work, including work on volume assumptions, business process and staffing case loads all reflected in the Resource Impact Assessment. As a result, we estimated that OSCR required a budget of £3.85m from 2006/07 together with set up costs of £545,000 in 2005/06.

Following discussions with the Bill Team, there is scope for some small reduction in both the ongoing and set up costs. We have therefore agreed with the Bill Team that a figure of £3.6m ongoing costs for 2006/07 (i.e. a further additional £1.3m) and a set up figure of £400,000 in 2005/06 is a realistic allocation at this stage. The Minister has agreed this revised allocation.

3. Did you have sufficient time to contribute to the consultation exercise?

Response
Yes

Costs

4. If the bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

Response
See question 2

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

Response
On the basis that the Minister has approved the 2006/07 budget figure of £3.6m and additional set up costs of £400,000 in 2005/06 we believe that OSCR can meet the financial costs associated with the Bill as presently drafted. It is
possible that further costs may arise and need to be allocated once the Bill has progressed further, and we have a clearer idea of expectation in relation to the key variables (see 6 below).

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

Response
(i) Our discussions and the discussions with the Bill Team centred on the margins of uncertainty associated with estimates of volume assumption of all aspects of business, staffing case loads and staff grading.

Overall, the Resource Impact Assessment was structured to reflect a phased introduction (a) set up or transition costs in 2005/06 (b) first year costs in 2006/07 (c) full year costs in 2007/08 allowing for an additional 3% inflation allowance.

(ii) In the Resource Impact Assessment we identified key variables as:

(a) How proactive OSCR is expected to be in the monitoring for the new charity test. This is explicit in the consultation paper, but not in the Bill.

(b) The scope of the new appeal process e.g. a third party right of appeal would add significantly to costs.

(c) The extent of the consent regime introduced by the Bill.

(d) The detail of transition provisions.

We will pay particular attention to the impact on key variables throughout the Parliamentary process.

(iii) The Committee may wish to note that we have so far as possible reflected the recent Efficient Government announcement, by assuming that OSCR can rely on the main Scottish Executive Central Services for some back office services (e.g. HR, pay roll, some IT, finance).

Wider Issues
7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

Response
In developing the Resource Impact Assessment, OSCR has used the EFQM model. Within the RIA, estimated costs associated with OSCR own compliance
with wider policy initiatives are grouped under leadership and governance, and include:

- Equal opportunities
- Best Value
- Efficient Government
- Community Planning
- Scottish Executive Compact with the Voluntary Sector

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

Response
For the initial period, the costs of OSCR developing guidance for the sector are included within the agreed RIA figure.

SUBMISSION FROM THE NATIONAL GALLERIES OF SCOTLAND

Consultation
1. Did you take part in the consultation exercise for the Bill if applicable and did you comment on the financial assumptions made?

Yes, The Trustees of the National Galleries of Scotland sent in a response expressing concern about the independence issue. This did not actually appear in the draft bill, but was mentioned in the accompanying notes. We did not prepare specific figures, but we did say that this would have an adverse impact on the fundraising capability of the National Galleries of Scotland.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

No.
The independence test is now a key part of the Bill. As it currently stands the Scottish National Institutions (The National Galleries of Scotland, The National Museums of Scotland, The National Library of Scotland, The Royal Botanic Gardens Edinburgh and the Royal Commission of Ancient and Historic Buildings) will have to chose between being an NDPB or a charity.

Assuming the heritage assets of the country will remain under public control, the loss of charitable status becomes inevitable for these organisations.

3. Did you have sufficient time to contribute to the consultation exercise?

No – the consultation time was short – particularly when taking into account the issue that concerned NGS did not appear on the face of the bill and it was
unclear about how it would be dealt with. Consequently when the independence issue appeared on the face of the bill, on November 15th 2004, bringing the issue of the charitable status of the national institutions/NDPBs to the fore, we felt there had been a significant change in emphasis. Furthermore, there has been little time to discuss the impact on the national institutions.

 Costs
4. If the bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not please provide details?

This will have a profound impact on the National Galleries of Scotland and the other national institutions responsible for the Nation’s Collections. For example:

£13 million of private funds were raised for the £30 million Playfair Project. The project simply would not have happened without this private/public partnership.

Trusts and Foundations gave over £8 million – and are usually restricted to giving to charitable bodies. Individual donations would be severely hampered as people are very reluctant to give to non charitable bodies.

We will be at a comparative disadvantage with similar institutions in England and Wales, which have dealt with their national cultural institutions by creating exempt Charities. While they continue to develop inspirational capital projects and build up revenue streams from philanthropy our fundraising will be restricted.

Our long term future to build our philanthropic base through donors and friends will be affected. Currently we have 2500 Friends who gave over £200,000 to Playfair in addition to their annual Friends gift.

The rates of the NGS will increase to £500,000 pa from £100,000 pa.

Future capital projects, such as the restoration of the Scottish National Portrait Gallery will be put at risk due to our inability to raise significant private funds without charitable status.

We have used a combination of private/public funds to purchase acquisitions, both large and small. Our approach is to use the purchase grant, recently reinstated by the Scottish Executive to lever funds to add to the Collection. While Heritage funds will still be available to us, the lack of charitable status will reduce our effectiveness in leveraging gifts from third parties.

We will no longer be able to collect gift aid. In the Playfair Campaign, this accounted for some £400,000. We also claim gift aid on revenue fundraising – currently at a more modest level of approximately £20,000 pa – but increasing.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?
No, we have no ready means to replace the lost income due to loss of our charitable status.

Meeting the direct costs of the bill (eg business rates) will put severe strain on an organisation that is already under severe financial pressure to maintain the quality of service and to provide greater access to the people of Scotland to their national collections, unless additional funds are made available from the Scottish Executive.

The opportunity costs of restricting our fundraising base will be profound in the longer term. There has been some limited exploration of setting up a charitable body – but this under the terms of the Bill would have to be independent of the National Galleries. This raises profound issues about control and strategic direction when talking about raising millions of pounds to support long term projects. A separate charity may work at the margins to bring in some philanthropic support - but our overall development programme would be severely hampered.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

No – the costs are an underestimate. No reference is made to fundraising for capital projects. The Playfair project raised the largest private sum of money for a cultural project in Scotland - £13 million

Wider Issues
7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

We do not believe the costs are accurately reflected.

On wider policy issues we would question why the definition of a charitable institution is being defined to a narrower basis which will act as a restriction on expanding philanthropic funds generated in and coming to Scotland.

We have recently been successful in being awarded a Kresge Challenge Grant of Michigan USA - which required us to have charitable status to apply – and would like to quote from their latest letter:

“We’re delighted here with your progress. I am especially impressed by your success among individuals, both with large and new gifts – and with new donors and old friends. Your individual fundraising since the challenge began is truly breathtaking. As you know, individuals are your most loyal donors, so bringing in this kind of support can really strengthen your capacity in the long run.
Indeed given your prominence and success, it is probably safe to say you are not only securing a stronger future for the National Galleries, you are raising the standards for fundraising throughout Scotland.” William F.L Moses, Senior Program Officer

This kind of success will be lost to the national institutions if the Bill is passed in its current form.

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

The overriding concern for the National Galleries of Scotland is the opportunity cost – which is not covered in the legislation

The National Galleries as a public body (NDPB) is accountable and transparent, affected by such government policy such as Freedom of Information Act. As guardians of the cultural heritage of Scotland, this is something the Trustees welcome. It serves Scotland’s interest that we remain both a charity and a public body. To force the NGS to be either an NDPB or a charity will have costs associated with it – which are very difficult to assess.

We are concerned that legislation is being passed in a tight time frame, without adequate research to assess the full costs or impact on the National Institutions and without adequate consultation with the bodies concerned.

We would strongly recommend that a similar solution to England and Wales for the national institutions be found – so that the heritage/cultural institutions operate on a level playing field across the UK.

SUBMISSION FROM THE NATIONAL MUSEUMS OF SCOTLAND

Consultation
NMS did not take part in the consultation exercise for the Bill. At the time of the consultation our understanding was that the national cultural institutions would not be affected by the Bill.

Costs
4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

The Financial Memorandum does not accurately reflect the financial implications of the Bill for NMS at all. Under the Bill as drafted NMS will lose charitable status, because as an NDPB it is under the direction of Ministers, and cannot pass the Charities test of independence. Loss of charitable status has very
significant financial implications for NMS. These are detailed below (all figures relate to 2003/04 unless otherwise specified):

4.1 Loss of Significant Tax Benefits

4.1.1 Charitable Rate Relief

NMS will lose charity exemption on property rates, being currently £1.2m across all its sites. This figure is expected to increase after revaluation.

It would be essential for the Scottish Executive to compensate NMS for this loss through an equivalent adjustment to Grant-in-Aid. In principle this would be budget neutral to the Scottish Executive, as the Executive would be able to recover from the block grant to Local Authorities. However a mechanism would need to be in place to effect this.

4.1.2 Charitable Tax Relief – Revenue Fundraising/Gift Aid

Charitable tax reliefs are essential to encourage giving outwith capital campaigns. Last year NMS received grants of over £300,000, which was applied to special exhibitions, research programmes and educational activities. Most of this sum may not have been given without charitable status. NMS and its supporters would lose a range of charitable tax relief. In addition there would be a wider impact from the public reaction to NMS no longer being a charity. This is likely also to affect support such as sponsorship in kind.

Specific losses are noted below:

NMS would not be able to enhance the value of donations made under Gift Aid, which increases the benefit by 28% at no cost to the donor. NMS loss estimated at £50,000 in relation to this.

Donors who pay higher rate tax (ie. those most capable of making significant donations) would not be able to claim higher rate relief through their self-assessment tax return.

Gifts to NMS (both lifetime gifts and legacies) would not be exempt from Inheritance Tax.

A donor making a gift to NMS in the form of shares would no longer benefit from Capital Gains Tax exemption and would not receive Income Tax relief of 100% of the market value of the donated shares.

Some of these losses would be mitigated by directing donations through the NMS Charitable Trust. However some donors would not wish to see their money
routed through even a charitable trust to an organisation which was itself not charitable.

4.1.3 Charitable Tax Relief – Capital/Campaign Fundraising

Charitable tax relief is absolutely essential to capital fundraising within the private sector for visionary capital development projects such as the Museum of Scotland and the Royal Museum Masterplan, most of which are successful public/private partnerships:

The Museum of Scotland Campaign in the 1990s raised approximately £10m from non-government sources (charitable trusts and foundations, business organisations and private individuals) both in the UK and overseas. This figure does not include the award of £6.75m made by the Heritage Lottery Fund. The three major categories of donation (Founders, Guardians and Stewards) totalled just over 300 gifts but contributed more than 90% of the total money raised. The majority of these gifts also involved charitable tax relief and many of the donations may not have been made at all had an attractive tax break not been available to higher rate taxpayers.

The Royal Museum Masterplan is a visionary £45 million project which will transform the Royal Museum with much improved public access, new learning centres, public facilities and new displays. It is envisaged that £12 million will be raised from the private sector, with the balance of funding sought from the Heritage Lottery Fund and the Scottish Executive. Without charitable status it will be more difficult to raise private sector support, and the project will be at risk. NMS estimates that at least £5 million of the £12 million sought would not be forthcoming:

£6 million would be sought from Charitable Trusts. Most of the larger trusts would not give direct to NMS without charitable status, and would have reservations about routing their donations through the NMS Charitable Trust, because it is independent of NMS. Estimated reduction in giving of £4 million.

£5 million would be sought through personal gifts. Some givers will not be comfortable with giving to NMS without charitable status. Some givers will not be comfortable either with their donations being routed through the NMS Charitable Trust. Estimated reduction in giving of £1 million.

Some of these losses would be mitigated by directing donations through the NMS Charitable Trust. However this itself raises significant strategic issues, notably whether the public interest is best served by the private sector funding for the capital development programme of a major cultural institution being in the control of an independent and essentially
unaccountable charitable trust which has the power to direct how that funding is applied.

4.2 Philanthropic Support for Major Cultural Projects

In addition to the specifics of loss of eligibility for tax reliefs, loss of charitable status by organisations such as NMS and others like it, raises much wider issues of the principles on which much philanthropic support is based. A number of major cultural projects in Scotland have come about as a result of successful public/private partnership for capital funding. The realistic prospect of private sector support is an essential requirement in order to lever public and lottery funding. However, without charitable status the vast majority of private contributions would not have been forthcoming. Trusts and Foundations largely restrict their donations to charitable bodies. Individual donors are exceedingly reluctant to give to non-charitable public institutions, because they have the perception that if they do so, they are giving their money to the government. Many of the largest contributions to the Museum of Scotland campaign funds came from bodies which would not have given to a non-charitable organisation. To put this in context, the top 61 contributions accounted for more than £7m of the £10m raised.

4.3 Scottish Institutions in Comparison with Institutions in England and Wales

Under proposed charities legislation for England and Wales, the national cultural institutions will retain charitable status and will be regulated by the Department of Culture, Media and Sport. The current draft of the Scottish Bill will, if un-amended, place institutions in Scotland at a distinct competitive disadvantage to their English counterparts. Whilst the British Museum, the National Gallery, the British Library and the Science Museum will move forward with visionary plans, raising millions of pounds of philanthropic support, Scotland’s national cultural bodies will be deprived of such support through charitable giving. If NMS loses charitable status, and no alternative arrangement is put in place, there can be little doubt that the philanthropic support currently enjoyed will be directed elsewhere. In the longer term, this will not only undermine our ability to perform our core duties as custodians – and champions - of our cultural heritage, but will also impact on the attractiveness of Scotland as a tourist destination and as a major business centre in Europe.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think that these costs should be met?

NMS would not be able to meet the financial costs of the Bill, which would result from loss of charitable status. These fall into two categories:
5.1 Loss of tax reliefs and revenue donations.

These relate to relating to rates and revenue donations. These are estimated in 4.1.1 and 4.1.2 as:

<table>
<thead>
<tr>
<th>Type</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rates</td>
<td>£1,200,000</td>
</tr>
<tr>
<td>Revenue donations</td>
<td>£300,000</td>
</tr>
</tbody>
</table>

NMS would have to seek additional Grant-in-Aid from Scottish Executive in compensation.

5.2.1 Loss of private sector charitable giving on major capital projects,

As estimated in 4.1.3 and 4.1.4 above. It is very unlikely that the Scottish Executive would be able to replace these funds. NMS would have to curtail development of its collections, its public services and its large renewal projects which are the means to ensure continuation of an excellent standard of service to visitors from Scotland and overseas.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

Loss of charitable status would mean a permanent reduction in the level of private sector support for NMS.

Wider Issues

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

The costs of the Bill to NMS and to other cultural institutions which are NDPBs, comprise the costs consequent upon loss of charitable status. The Explanatory Notes to the Bill estimate these as up to £7 million for tax reliefs and Gift Aid (based on 2002 figures) as the loss for the whole NDPB sector. In our opinion this is a very substantial underestimate. The revenue costs to NMS alone are estimated as £1.5m per annum (See 5.1 above).

The impact on capital projects which involve substantial private sector charitable giving are set out above with examples. For the reasons given above most capital projects involving a public/private sector partnership will simply not be viable without charitable status available to the client organisation. The opportunity costs to the people of Scotland in terms of lost cultural assets and activity will be enormous.
8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so is it possible to quantify these costs?

The costs associated with the Bill will be the costs outlined above rising from loss of charitable status by the national cultural institutions, as outlined above.

SUBMISSION FROM SCOTTISH SCREEN

Consultation
1. A summarised response was submitted providing the estimated potential financial implications to Scottish Screen if charitable status was lost

2. Comments have only been partly reflected in Financial Memorandum (FM), as no reference to potential future corporation tax liabilities or loss of future funding streams in being unable to access charitable trusts and foundations.

3. At the time, yes, though it would have been helpful to have had ongoing consultation meetings to discuss the progress of the bill and to enable us to agree on an action plan with other NDPBs.

Costs
4. The issue of rates relief has been addressed in the FM. Although this has a near neutral effect for the Scottish Executive, in that the local authority is recompensed by the Scottish Executive up to 95% anyway, Scottish Screen would however need funds to be paid direct to Scottish Screen via an increase in Grant in Aid to cover the direct payment of rates.

Two other significant areas of concern have not been reflected. There is no reference to potential future corporation tax liabilities or the loss of income in being unable to access charitable trusts and foundations. This will have an immediate impact on the projects we can undertake as well as a substantial future impact on our ability to leverage additional income to support our activities by accessing charitable funding streams. In line with this point the benefits gained in being a charity in attracting collaborations and funding will be lost.

5. Based on the estimated costing as specified in the FM, Scottish Screen should be able to meet:
   - Registration and administration staff time – approx £1000
   - Printing corporate stationery – approx £1000

We do however have a concern over the potential level of reporting which will be required under the new Bill and the resulting implications with regard to staff time/resources, which at present because reporting detail is not specified, cannot be quantified
Rates – although a neutral effect for the Scottish Executive we would require an uplift in our GIA of approx £140,000 per annum for current premises over three sites (estimated figure based on available information)

Corporation tax – not addressed in FM. Although, we are a not for profit organisation and therefore aim to achieve a break even position, by losing charitable status we would become liable to corporation tax, thereby diverting funds from delivery of objectives to payment of tax.

Loss of access to charitable trusts and foundations – eligibility for funding from some charitable trusts and foundations, is based on the charitable status of the applicant. As has been raised already above, this represents a huge lost opportunity as opposed to an additional cost in that it would substantially limit the additional potential benefit Scottish Screen could bring to areas within which we operate, in that projects would simply not be undertaken as they would be dependent on the receipt of external partnership funding.

6. With the exception of the loss of current and future income from charitable trusts and foundations and potential costs associated with corporation tax, as outlined in our response to 4, above, then it seems the cost margins are reasonably accurate in terms of Scottish Screen’s situation

7. Not Applicable

8. Hard to accurately predict if there would be future costs, but would generally expect that to be the case. eg, would be legal costs if NDPBs decide to pursue advice on potential other organisational structures to enable continued benefits from charitable status –

SUBMISSION FROM SCOTTISH NATURAL HERITAGE

Consultation
Question 1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

SNH did not take part in the consultation exercise for the Bill.

Question 2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

Not applicable. SNH did not take part in the consultation exercise for the Bill.

Question 3. Did you have sufficient time to contribute to the consultation exercise?

Not applicable. SNH did not take part in the consultation exercise for the Bill.
Costs

Question 4. If the bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

Issues relating to the loss of tax reliefs, non-domestic rates relief and the prohibition of the transfer of funds to a non-charity in certain circumstances are accurately reflected in the Financial Memorandum.

In addition, we note that the loss of rates relief will be exacerbated by the current rates review, which comes into effect on 1 April 2005.

We are unclear whether the current tax relief on interest from funds on deposit would also be lost because of the loss of charitable status.

We note that the equivalent legislation for England and Wales does not propose the loss of charitable status for our sister Country Agencies, English Nature and Countryside Council for Wales. This could potentially place us on an unequal financial footing and complicate partnership working arrangements.

Linked to this, there could be legal difficulties in the administration of bequests between the three Country Agencies if two remained charities and one did not. Again, this could place us at a funding disadvantage.

We assume, but have not researched, that the potential loss of charitable status would not lead to any retrospective claims to pay back some of the partial VAT relief that we have claimed in the past on the construction of new buildings.

Question 5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

SNH could not absorb the financial costs associated with the Bill, if it meant a loss of charitable status, without adverse impact on its operational activities.

Our working assumption is that the financial impact for SNH would be fully funded by the Scottish Executive. Our reasoning is that the net impact of any changes to tax revenues would be cost neutral in public sector terms.

Question 6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

Although it is not currently a significant proportion of SNH’s funding, there is concern that the loss of charitable status would create uncertainty and practical
difficulties over SNH receiving funds from organisations whose constitution prohibited funding a “non-charity”.

**Wider Issues**

Question 7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

Subject to the points above, we have no further comment.

Question 8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

Subject to the points above, we have no further comment.

**SUBMISSION FROM THE NATIONAL LIBRARY OF SCOTLAND**

**Consultation**

1. The National Library of Scotland did take part in the consultation exercise for the Bill. A letter was submitted by Martyn Wade, National Librarian dated 12 August 2004, noting our concern at the possibility that the legislation could result in the ending of charitable status for the NLS as an NDPB. Our reading of the draft Bill led us to the conclusion that the NLS could retain charitable status whilst remaining an NDPB. We further commented on the importance of charitable status in assisting the Library develop fundraising approaches to deliver our new strategy. Mention was also made of tax reliefs amounting to £497,000 per annum.

2. We do not believe that our comments on the financial assumptions have been accurately reflected in the Financial Memorandum.

3. We had no problems with the time given to respond to the consultation.

**Costs**

4. As noted at 2 above, we do not believe that the financial implications for NLS have been accurately reflected in the Financial Memorandum. Loss of charitable status would have a significant financial impact on the NLS.

Our estimate of rate and other tax (VAT) relief 2003/4 is £500,000 using 2003/4 figures. This of course would increase as the Library develops its £28m capital building programme in line with our Strategy.

More significantly would be the threat to our capacity to develop our fundraising campaign. The NLS is currently pursuing the purchase of the John Murray Archive. The success of this project requires that we raise £6.5 m of the £32m total from a fundraising campaign, with the balance funded from the Heritage Lottery Fund and the Scottish Executive. Charitable tax relief is an essential
element in raising funds from the private sector and individuals and loss of the associated tax reliefs would seriously jeopardise this project.

The Library is also committed to implementing a sustainable fundraising campaign to raise funds for ongoing programmes, exhibitions and educational activities. It is not possible at this stage to identify a value for this activity but it is reasonable to assume that this element of our strategy would not be deliverable without charitable tax relief. This is due to the fact that donors will be less inclined to contribute if they are unable to claim tax relief on the donation, and equally, life time gifts and legacies, if not exempt from Inheritance Tax would be likely to go elsewhere.

This is particularly problematic given that under the proposed charities legislation for England and Wales, the national cultural institutions will retain charitable status whilst continuing to be regulated by the Department of Culture, Media and Sport. It is not difficult to envisage that funds that may have been directed to Scottish Cultural Institutions would be redirected to our counterparts in England and Wales, seriously affecting our capacity to participate as equals on the world cultural stage.

5. The National Library of Scotland could not meet the costs associated with the Bill and would need to seek additional Grant –in –Aid funding from the Scottish Executive to compensate.

6. The Financial memorandum does not address the margins of uncertainty associated with the estimates. The inability to progress sustainable fundraising could have a significantly detrimental impact on the ability of the NLS to deliver its current strategic commitments to the standards and quality intended.

Wider Issues
7. As above.

8. As above.

SUBMISSION FROM THE ROYAL BOTANIC GARDEN

Consultation
RBGE did take part in the consultation exercise for the Bill, extensively. At the time of the consultation our understanding was that the national cultural institutions would not be affected by the Bill.

Costs
6. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.
The Financial Memorandum does not accurately reflect the financial implications of the Bill for RBGE at all. Under the Bill as drafted RBGE will lose charitable status, because as an NDPB it is under the direction of Ministers, and cannot pass the Charities test of independence. Loss of charitable status has very significant financial implications for RBGE which are detailed below:

4.1 Loss of Significant Tax Benefits

4.1.3 Charitable Rate Relief

RBGE will lose charity exemption on property rates, being currently £0.25m across all its sites. This figure is expected to increase after revaluation.

It would be essential for the Scottish Executive to compensate RBGE for this loss through an equivalent adjustment to Grant-in-Aid. In principle this would be budget neutral to the Scottish Executive, as the Executive would be able to recover from the block grant to Local Authorities. However a mechanism would need to be in place to effect this.

4.1.4 Charitable Tax Relief – Revenue Fundraising/Gift Aid

Charitable tax reliefs are essential to encourage giving outwith capital campaigns. Last year RBGE received grants of over £500,000, which would not have been given without charitable status. RBGE and its supporters would lose a range of charitable tax relief. In addition there would be a wider impact from the public reaction to RBGE no longer being a charity. This is likely also to affect support such as sponsorship in kind.

Specific losses are noted below:

RBGE would not be able to enhance the value of donations made under Gift Aid, RBGE loss estimated at £81,000 in relation to this.

Donors who pay higher rate tax (ie. those most capable of making significant donations) would not be able to claim higher rate relief through their self-assessment tax return.

Gifts to RBGE (both lifetime gifts and legacies) would not be exempt from Inheritance Tax. Could cost on average around £200,000/year+.

4.1.4 Charitable Tax Relief – Capital/Campaign Fundraising

Charitable tax relief is absolutely essential to capital fundraising within the private sector for visionary capital development projects such as the
Museum of Scotland and the Royal Museum Masterplan, most of which are successful public/private partnerships:

The RBGE Gateway Project is a visionary £13 million project which will transform the West Gate into the centre for biodiversity communication in Scotland, with much improved public access, new learning centres, public facilities and new displays. It is envisaged that up to half of this will be raised from the private sector, with the balance of funding sought from the Scottish Executive. Without charitable status it will be virtually impossible to raise private sector support, and the project will be at risk, despite having raised £1 million already through private donations:

£3 million would be sought from Charitable Trusts. Most of the larger trusts would not give direct to RBGE without charitable status.

£2 million would be sought through personal gifts. Some givers will not be comfortable with giving to RBGE without charitable status. Some givers will prefer to give via their Charitable Trusts – a route which would be closed to them without charity status.

4.2 Philanthropic Support for Major Cultural Projects

In addition to the specifics of loss of eligibility for tax reliefs, loss of charitable status by organisations such as RBGE and others like it, raises much wider issues of the principles on which much philanthropic support is based. A number of major cultural projects in Scotland have come about as a result of successful public/private partnership for capital funding. The realistic prospect of private sector support is an essential requirement in order to lever public and lottery funding. However, without charitable status the vast majority of private contributions would not have been forthcoming. Trusts and Foundations largely restrict their donations to charitable bodies. Individual donors are exceedingly reluctant to give to non-charitable public institutions and many give through charitable trusts.

4.3 Scottish Institutions in Comparison with Institutions in England and Wales

Under proposed charities legislation for England and Wales, the national cultural institutions will retain charitable status and will be regulated by the Department of Culture, Media and Sport or DEFRA. The current draft of the Scottish Bill will, if un-amended, place institutions in Scotland at a distinct competitive disadvantage to their English counterparts. Whilst the Royal Botanic Garden Kew, the British Museum, the National Gallery, the British Library and the Science Museum will move forward with visionary plans, raising millions of pounds of philanthropic support, Scotland’s national cultural bodies will be deprived of such support through charitable giving. If RBGE loses charitable status, and no alternative arrangement is put in place, there can be little doubt that the philanthropic
support currently enjoyed will be directed elsewhere. In the longer term, this will not only undermine our ability to perform our core duties as custodians – and champions - of our cultural heritage, but will also impact on the attractiveness of Scotland as a tourist destination and as a major business centre in Europe.

7. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think that these costs should be met?

RBGE would not be able to meet the financial costs of the Bill, which would result from loss of charitable status. These fall into two categories:

5.2 Loss of tax reliefs and revenue donations.

These relate to relating to rates and revenue donations. These are estimated in 4.1.1 and 4.1.2 as:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rates</td>
<td>£200,000</td>
</tr>
<tr>
<td>Revenue donations</td>
<td>£300,000</td>
</tr>
</tbody>
</table>

RBGE would have to seek additional Grant-in-Aid from Scottish Executive in compensation.

5.2.2 Loss of private sector charitable giving on major capital projects.

As estimated in 4.1.3 and 4.1.4 above. It is very unlikely that the Scottish Executive would be able to replace these funds. RBGE would have to curtail development of its collections, its public services and its large capital projects which are the means to ensure continuation of an excellent standard of service to visitors from Scotland and overseas.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

Loss of charitable status would mean a permanent reduction in the level of private sector support for RBGE.

Wider Issues

9. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

The costs of the Bill to RBGE and to other cultural institutions which are NDPBs, comprise the costs consequent upon loss of charitable status. The Explanatory Notes to the Bill estimate these as up to £7 million for tax reliefs and Gift Aid (based on 2002 figures) as the loss for the whole NDPB sector. In our opinion
this is a very substantial underestimate. The revenue costs to RBGE alone are estimated as £0.5m per annum (See 5.1 above).

The impact on capital projects which involve substantial private sector charitable giving are set out above with examples. For the reasons given above most capital projects involving a public/private sector partnership will simply not be viable without charitable status available to the client organisation. The opportunity costs to the people of Scotland in terms of lost cultural assets and activity will be enormous.

10. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so is it possible to quantify these costs?

The costs associated with the Bill will be the costs outlined above rising from loss of charitable status by the national cultural institutions, as outlined above.

SUBMISSION FROM SCOTTISH ARTS COUNCIL

This questionnaire is being sent to those organisations that have an interest in, or which may be affected by, the Financial Memorandum for the Charities and Trustee Investment (Scotland) Bill. In addition to the questions below, please add any other comments you may have which would assist the Committee’s scrutiny.

Consultation
9. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?
The Scottish Arts Council did not take part in the consultation exercise in its own right however the Head of Funding and Resources made comments as part of the Scottish Finance Directors Group Submission.

10. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?
See Above

11. Did you have sufficient time to contribute to the consultation exercise?
Yes

Costs
12. If the bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.
The obvious costs – loss of rates relief etc. have been covered. Currently the Scottish Arts Council is able to achieve discounts on many of its purchases due to its charitable status. Software costs are significantly discounted to
organisations with charitable status. In our negotiations with suppliers we always place emphasis on our charitable status together with inability to reclaim VAT. Our banking costs are currently significantly reduced due to charitable status and given the volume of transactions the Council undertakes we would expect the changes should we lose charitable status to run to tens of thousands of pounds.

More importantly the loss of charitable status will impinge on the Councils plans to lever in funds from trusts and sponsorship. The Council is increasingly looking to partnership support and sponsorship for many of its projects this will become difficult if charitable status is removed.

13. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

Whilst the Scottish Arts Council is constantly reviewing its cost base and will work to the targets set by the Efficient Government Initiative the additional costs incurred as a result of a change in status we would expect be borne by the Scottish Executive.

14. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

See Above

Wider Issues

15. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

N/A

16. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

Future costs are hard to predict without guidance. If the Scottish Arts Council looses its charitable status as a result of this bill, it is unlikely that there will be further direct financial costs. However, as the majority of our client group, the 100 + arts organizations which we fund, are registered charities future costs introduced through subordinate legislation or guidance notes may be borne by them which in turn may have an effect on the demand for funding from the Scottish Arts Council.

SUBMISSION FROM ANNE SWARBRICK

Anne Swarbrick is accredited by the Law Society of Scotland as a specialist in Charity Law. She is an Associate of Anderson Strathern, Solicitors. She was, for more than ten years, a legal adviser to the Scottish Charities Office (SCO), which
was a division of Crown Office responsible for the supervision of charities in Scotland before that function was transferred to the new Office of the Scottish Charity Regulator (OSCR). Thereafter she was Head of Investigation at OSCR.

Anne has over many years, conducted or supervised the majority of SCO investigations, including all of their major enquiries. She has also provided advice to many charities which were under investigation but where it was appropriate, to address any shortcomings by offering the charity advice and assistance to improve its governance and practices.

Anne is also an experienced litigation lawyer.

1. **Part 1, Chapter 1 (Office of the Scottish Charity Regulator (OSCR)) and chapter 4 (Enquiries and Supervision.) Financial Memorandum paragraphs 119 to 121.**

   1.1 One of the most crucial aspects of this Bill from a financial point of view is that OSCR must be provided with the financial resources necessary to carry out its functions effectively. This certainly applies to the new functions. OSCR will also have increased powers in relation to the investigation of charities, their trading companies, associated companies and certain individuals. This represents an increased investigation role which will also require to be adequately resourced. There may be a temptation to believe that the creation of the Scottish Charity Register will reduce the requirement for investigations, but I do not believe that this will in fact be the case. Experience in England where the Charity Register has existed since 1960 strongly suggests that whilst the Register is a useful tool for investigation purposes and may also be of considerable assistance in detecting wrongdoing at an early stage, it does not replace properly conducted investigations. It is indeed quite possible that there will be an increased need for investigations because of increased vigilance owing to the presence of the Register itself.

2. **Part 1 Chapter 2 (Scottish Charity Register) Paragraphs 122 to 130.**

   2.1 Paragraph 122 indicates that “as the new definition is largely in keeping with the existing definition, we do not however anticipate any significant change to either the size or growth of the charity sector as a result of this.”

   2.2 I do not accept that the proposed new definition is largely in keeping with the existing definition. It is narrower than the existing definition. It is clear from a comparison of the existing definition and the proposed new definition that this problem exists. In view of the fact
that the problem will show itself most severely in relation to the
fourth head of charity under the present law, ie "other purposes
beneficial to the community" (see SPICE briefing, page 6) and also
the fact that this has been the head of charity which has expanded
most over the years through case by case decisions, I would
anticipate that there will be quite a number of charities which will
experience these difficulties. I do not accept the premise that the
proposed new definition will have a neutral effect on either the
number of charities in Scotland nor their income.

2.3 Paragraph 129 narrates the potential effects upon some
independent schools of losing their charitable status. This paragraph
should also narrate that in the event that any charitable independent
school closes, the local authority for the area in question may be
required to educate a substantial number of additional pupils.

2.4 This section does not address the potential costs to beneficiaries of
charities which lose their charitable status and which close as a
result. These may well be people who are far from wealthy and,
depending upon the nature of the charity, they may also be
vulnerable. They may experience serious difficulties in obtaining the
services from another source. There may also be a knock-on effect
on the public purse, perhaps particularly for local authorities.

2.5 This section also does not take account of the costs which charities
will incur in attempting to maintain their charitable status. For many
charities this would entail obtaining legal advice as to whether their
existing purposes will fall within the proposed new definition or
whether these will require alteration. For some others there may be
a lengthy legal battle through the Scottish Charity Appeals Panel,
the Court of Session and possibly further. This will be a drain on the
funds of these charities.

3. Part 1, Chapter 5 (Reorganisation of charities)
Paragraphs 144 to 146

3.1 Section 44 relates to educational endowments which are trust funds
held by many educational institutions, such as universities, which
exist to further their educational purposes.

3.1.1 There has been a historic difficulty with the provisions of
sections 10 and 11 of The Law Reform (Miscellaneous
Provisions) (Scotland) Act 1990 which provided small trusts
with simplified procedures by which they may reorganise.
Educational endowments are, however, excluded from those
provisions which prevents small educational endowments
from reorganising under procedures which might be ideal to address their financial difficulties. They can, of course, reorganise under the Education (Scotland) 1980, but this procedure involves an application to the Court of Session and is too costly to address the problems of small endowments. The strength of the 1980 Act is, however, that an educational establishment such as a university can reorganise large numbers of educational endowments in one exercise.

3.1.2 The effect of section 44 will be to deny this in future, because such an exercise could not include any endowment which is a charity. This will have a cost implication.

3.1.3 It would be more cost effective to allow educational endowments access to both the procedures under the 1980 Act and the procedures applicable to small trusts under the 1990 Act. This would ensure that the procedures are sufficiently flexible to allow the most helpful procedure to be used and make it easier for such educational establishments to adapt to changing circumstances.

3.2 Sections 40 and 41 of the Bill apply to charities only. Sections 10 and 11 of the 1990 Act would continue to apply to public trusts. Public trusts often have outdated purposes and wish to wind up and transfer their funds to a charity with similar purposes.

3.2.1 One of the main difficulties with the provisions of section 10 and 11 has been that they prohibit the transfer of funds from public trusts to charities which are incorporated. The effectiveness of the provisions of section 10 and 11 of the 1990 Act could be greatly improved if its provisions were amended to allow this to happen. This would make it possible for public trusts with outdated provisions to transfer their assets to an incorporated charity which is doing similar work.

4. Part 1, Chapter 9 (Charity Trustees)
Paragraphs 154 to 157

4.1 Paragraph 142 refers to the additional duties imposed on charity trustees by section 65 of the Bill. Charity trustees are largely unpaid volunteers who run charities in their spare time. It is already difficult for charities to attract people willing to undertake the increasingly onerous role of charity trustee. Such people already face heavy civil sanctions and unwelcome front page publicity as a result of possible
action by OSCR. The requirements of clause 65 and the criminal provisions imposed by this clause are much too demanding of volunteer charity trustees and are likely to deter people from volunteering for this role. There may also be resignations of existing charity trustees because of these provisions.

4.2 In view of potential difficulties with recruitment and possible resignations, it is unlikely that charities will view the potential cost of these provisions as marginal.

5. Part 1, Chapter 10 (decisions, notices, reviews and appeals)
Paragraphs 158 to 161

5.1 Paragraph 161 indicates that charities wishing to dispute OSCR’s decisions will be able to do so without incurring the costs associated with a court action. The Scottish Charity Appeal Panel is prohibited from awarding expenses to either OSCR or to an appellant. The result of this is that if a charity or an individual wishes to take legal advice in connection with a potential appeal, they must bear that cost themselves, even where OSCR’s decision is found to be wrong. The costs of going to the tribunal properly advised may therefore be prohibitive for both charities and individuals. At the same time it would be inadvisable for charities to forego legal advice in such circumstances as this would result in a gross inequality of arms between the appellant and OSCR. In order to equalise the power of an appellant and OSCR the Scottish Charity Appeals Panel should have power to award expenses to successful appellants. It should also have power to award expenses to OSCR but only where the tribunal decides that an appeal amounted to an abuse of process. That is what the Joint Committee of the House of Commons and House of Lords has proposed for England and Wales. The arguments in favour of this approach apply equally in Scotland.

5.2 Those who have a right of appeal to the Scottish Charity Appeals Panel are limited to either (a) the charity or (b) the person in respect of whom the decision was made, depending upon the type of order. Any other person who wished to challenge a decision of OSCR would require to raise a Petition in the Court of Session seeking Judicial Review of the decision. This is a very costly exercise. This cost could be avoided by widening the potential appellants to the Scottish Charity Appeals Panel to include “any person who is or may be affected by” OSCR’s decisions. That would mean that the tribunal could hear the arguments of all parties.

6. Part 3, (Trustee investment powers)
Paragraphs 169 to 171

6.1 Paragraph 171 narrates that the purpose of the proposed reform is to produce a better return than present investments. The proposals miss an opportunity to give to Scottish trustees important powers which could result in significant improvements in both investment performance and income for some charities and trusts.

6.2 Part IV of the Trustee Act 2000 gave trustees in England and Wales power to delegate certain functions, including investment of assets to agents or nominees. This power should also be given to Scottish trustees in order to increase the possibilities of improving investment returns.

SUBMISSION FROM ROYAL COMMISSION ON THE ANCIENT AND HISTORICAL MONUMENTS OF SCOTLAND

Costs
If the bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

Under the bill as drafted, RCAHMS might lose charitable status. As a Royal Commission operating under Royal Warrant, our Commissioners are appointed by the Queen with the approval of Ministers. Therefore, it appears we could fail the test of independence required to retain charitable status, as interpreted under the current draft Bill. Loss of Charitable status would have a significant impact on our work and serious financial implications for RCAHMS.

The financial impact on RCAHMS would be a loss of revenue of approaching £0.5 Million a year (over 15% of turnover) and it would seriously curtail both our current activities and our ability to develop our fundraising potential in the future, thus greatly increasing our dependence on Scottish Executive Funding.

RCAHMS would lose exemption on: property rates, VAT eg. on fuel and power, and the climate change levy. Currently, this saving is in the region of £150,000. However, during 2006-2008, RCAHMS will be building a new archive store with £12m from the Scottish Executive. Conservative estimates suggest that we would make in the region of £700,000 savings due to exemptions on the cost of building and a further annual £150,000 on the new building. Although still very much in the initial stages, it is our intention to embark on a major fundraising campaign to add to the £12m already promised for the new building. This is comparable to the capital fund raising schemes that have been undertaken by the National Galleries and the National Museum of Scotland, which similarly benefit from charitable status in these major building ventures.
RCAHMS also benefits from manufacturers discounts, eg. on camera and scanning equipment, and, in particular, on ICT hardware and software, in some cases attracting up to 100% discount on software licences. There is no question that highlighting charitable status at the negotiating stage for software and other ICT services is effective in reducing costs, either with an official 'charitable reduction scheme', or in assisting the case for other reductions or simply for gaining small advantages such as assistance in kind. The amount saved varies from year to year depending on our ICT refresh strategy, but is in the region of £100,000 in the current year.

RCAHMS believes that there would be a major detrimental effect on our ability to maintain our status as one of the world’s leading centres of excellence for the heritage, particularly in the field of the online delivery of information through Canmore, Pastmap and our joint venture (SWISH) with our sister body in Wales, RCAHMW. These initiatives are dependent on our charitable status not only for discounts on capital equipment and software licensing but because our charitable status allows us to share best practice and provide shared services for others in the delivery of similar information (eg. Historic Scotland, Local Government Sites and Monuments Records) where their own status would seriously inhibit their own cost-effective services.

Although the actual cost is difficult to calculate, partnerships with other charitable and non-governmental bodies, ‘in kind’ services, educational and other discounts, and gifts of archive to our National Collection are among the many activities that could be seriously affected by loss of charitable status. A recent example is the outright gift of the Basil Spence Archive to RCAHMS by an individual donor. This archive, comprising 38,000 items is of considerable value to Scotland and has attracted a grant of £975,000 from the HLF to catalogue and conserve it and make it available to the public through exhibitions, and over the internet.

**Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?**

RCAHMS would be unable to meet the financial costs of the Bill and would have to seek increased funding from the Scottish Executive. Loss of charitable status, however, would not only make the organisation ineligible for the cost savings outlined above, but also changes the way in which the organisation is perceived. The goodwill and intangible benefits received currently are impossible to replace with finance.
Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

The financial memorandum does not take into account the amount of financial support received by RCAHMS from the commercial and business sector nor the potential for raising funding from charitable donations. It does not reflect the margins of uncertainty and seriously limits RCAHMS potential development of its future vision, which includes, amongst other things, the major building project. The £12m funding allocated will provide a much needed store for RCAHMS, but the intention is to use the funds from the Scottish Executive to lever considerable additional funding – only possible if RCAHMS retains charitable status. This will allow the construction of a better facility for the national collection held by RCAHMS and the expansion of our educational and outreach capability.

RCAHMS is embarking on a new vision for which includes a much more customer-centred approach and concentrates on Education and Outreach to the citizen. Reduction in funding caused by the loss of charitable discounts, will make this vision even harder to realise, but the perception of the organisation as one which is no longer eligible for charitable status, will, I believe, send a negative message to those partners and the public with whom we wish to engage more fully.

Emma Berry
Assistant Clerk to the Finance Committee
The Charities and Trustee Investment (Scotland) Bill was introduced in the Scottish Parliament on 15 November 2004.

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

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KEY POINTS OF THIS BRIEFING

- It is estimated that there are over 28,000 charities in Scotland, 67% of which have an income of less than £25,000 per annum.

- The definition of a charity used by the Inland Revenue and the Charity Commission of England and Wales dates back to the Charitable Uses Act 1601.

- Charity law has developed differently in each of the countries making up the United Kingdom. In England and Wales legislation concerning charities has been passed at numerous points over the past several centuries, whilst in Scotland a “laissez faire” approach to charities existed until the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

- Since the 1990 Act there have been several reviews of charity law in Scotland culminating in the Scottish Charity Law Review Commission (‘the McFadden Commission’), which reported in 2001. After a lengthy consultation process the Charities and Trustee Investment (Scotland) Bill was introduced on 15 November 2004.

- The Home Office produced a draft Charities Bill for pre-legislative scrutiny by a joint committee of the House of Lords and the House of Commons which reported its recommendations in September 2004. The UK government plan to introduce a Charities Bill in this Parliamentary session.

- The Charities and Trustee Investment (Scotland) Bill removes the presumption of public benefit for all charities and introduces the two-part “Charity Test”.

- The Bill also allows for a proportionate regulatory regime to be introduced by Ministers.

- The Bill introduces a new legal form for charities to take on corporate status, and limit liability for their members.

- The Scottish and the UK Bills differ in some degree, but overall are complimentary.
INTRODUCTION

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

This briefing:

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

A brief history of charities in Britain

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

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

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

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

**“The McFadden Report”**

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

**England and Wales**

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

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

**The Scottish Executive’s approach**

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

**The legislative background of charity law in Scotland**

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

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

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

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

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

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

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

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

This resulted in Part 1 of the 1990 Act.

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

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

*Accountability*

The 1990 Act sought to ensure that Scottish charities were publicly accountable, by providing readily available information about the activities of charities to the general public, though it did not introduce a public index or register of charities. Prior to the 1990 Act such information could not be obtained as it was impossible for the Inland Revenue to advise whether or not an organisation had charitable status for tax reasons, because the Inland Revenue had a statutory duty to keep such information confidential.
Supervision
Prior to the 1990 Act there was no general power to investigate cases of wrongdoing, though the Inland Revenue could investigate alleged instances of tax irregularities and the Court of Session has certain powers to investigate alleged wrongdoing where a charity takes the form of a trust. The 1990 Act gave the Lord Advocate more powers to monitor and investigate charities.

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

THE CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) BILL
This part of the briefing will describe briefly the main sections in each chapter of the Bill. A more detailed analysis will follow in subsequent briefings.

PART 1 – CHARITIES
Part one of the Bill consists of 10 chapters including the establishment and powers of the Office of the Scottish Charity Regulator (OSCR); the public benefit test; the creation of a new incorporated form for charities; designated religious charities, and the duties of Charity Trustees.

Chapter 1 – Office of the Scottish Charity Regulator
The Chapter establishes OSCR as a statutory body corporate, sets out its general functions, and places it under a duty to produce an annual report.

Chapter 2 – Scottish Charities Register
The Register
OSCR will be obliged to set up and maintain a register of all charities in Scotland. This register is expected to be publicly available on OSCR’s website, and will include a number of details about a charity including the purposes of the charity and whether or not it holds designated national collector status for fundraising purposes. Section 3 (4) allows for some information held by OSCR to be excluded from the public for safety and security reasons.

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

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

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

Chapter 3 – Co-operation and information

Co-operation

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

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

Chapter 4 – Supervision of charities

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

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

Powers of the Court of Session

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

Chapter 5 – Reorganisation of charities

This chapter is intended to make it easier for charities to amend their constitutions without having to apply to the courts. At present trust law requires that this step is needed to protect the views of the trusters if a charity’s constitution does not specifically allow changes. Charities will now be able to apply to OSCR for any amendments. (Scottish Parliament 2004b, para 37)
Chapter 6 – Charity accounts
This chapter proposes that accounts are kept by all charities, are independently examined or audited, and are sent to OSCR. Section 45 introduces a proportionate regime which will allow Ministers to detail through regulations what information will be required for different sized charities.

Chapter 7 – Scottish charitable incorporated organisations (SCIOs)
This part of the Bill introduces a new legal form for charities to take on corporate status, and to limit liability for their members. SCIOs will be regulated by OSCR, and much of the detail will be produced by Ministers via subordinate legislation.

Chapter 8 – Religious Charities
The bill introduces “designated religious charities”. This type of charity will be relieved of some reporting and accounting procedures, but will still have to pass the charity test to prove that it operates for the public benefit. The criteria which must be met for a charity to receive this status include—

The charity must have—

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

Chapter 9 – Charity trustees
The duties and liabilities of charity trustees are set out in this part of the Bill. A charity trustee must act in the interest of the charity while exercising their functions. They must also ensure that the charity acts in a way consistent with its purposes, and acts with care and diligence. A charity trustee is guilty of misconduct if they breach these duties.

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

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

Chapter 10 – Decisions: notices, reviews and appeals
This chapter introduces a three-tier appeal system against OSCR's decisions. The first is that any body affected directly can ask for an internal review of that decision; the second stage is the original decision is considered by the Scottish Charity Appeal Panel; and finally the appellant has recourse to apply to the Court of Session. The Scottish Charity Appeal Panel will consist of three persons appointed by the Scottish Executive.
PART 2 – FUNDRAISING FOR BENEVOLENT BODIES

Control of fundraising

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

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

Public benevolent collections

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

Designated national collectors

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

PART 3 – INVESTMENT POWERS OF TRUSTEES

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

MAJOR DIFFERENCES BETWEEN THE SCOTTISH BILL AND THE DRAFT UK BILL

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

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

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

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

- Purpose (e) in the Scottish Bill gives “the advancement of civic responsibility or community development” as a purpose, where the draft UK Bill cites “the advancement of citizenship or community development”.

- The Scottish Bill also includes “culture” explicitly in (2)(2)(f) whereas the draft UK Bill omits it leaving only heritage, arts or science.

- The most significant difference is that the Scottish Bill divides the draft UK Bill's (2)(2)(j) where it cites “the relief of those in need, by reason of youth, age, ill-health, disability, financial hardship or other disadvantage” (House of Lords, House of Commons, Joint Committee 2004, pg 18) into the following two parts—
  - “the provision of accommodation to those in need of it by reason of age, ill-health, disability, financial hardship or other disadvantage”; and
  - “the provision of care to the aged, people with a disability, young people or children.” (Scottish Parliament 2004a, Section 7(2))

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

- We recommend that the draft Bill includes a definition of religion in clause 2 making it clear that non-deity and multi-deity groups can satisfy the definition of 'religion' for charitable purposes. Any organisation would still be subject to the requirement of showing public benefit before it could attain charitable status.

- We recommend that an additional charitable purpose be added to 2(2) for "the provision of religious harmony, racial harmony, and equality and diversity".

- We recommend that the new charitable purpose on "the advancement of arts, heritage and science", should include the word "culture" to bring it in line with the wording of the draft Charities Bill and Trustee Investment (Scotland) Bill.

- We recommend that "the saving of lives" be added to the new charitable purpose of the advancement of health.

- We recommend that the draft Bill be amended by adding to the general 'any other purposes' category, the words 'or within the spirit or intent of the [11 specific] purposes' listed in clause 2 (2) above. (House of Lords, House of Commons, Joint Committee 2004, page 18)

Public Benefit

Both the Scottish Executive and the Joint Committee are in agreement that the presumption of public benefit be removed for all of the charitable purposes. To date organisations who have adhered to the charitable purposes of the relief of poverty and the advancement of education and religion have been presumed to be for the public benefit. However this will be replaced with
a two-part test where an organisation has one or more of the charitable purposes, as well as being able to demonstrate that it provides public benefit.

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

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

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

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

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

   (a) How any—

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

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

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

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

These criteria have been decided after the consultation exercise as well as trying to ensure that the principles are not significantly different from those expected to be eventually adopted in the UK bill as the Inland Revenue will decide on tax relief based on the Home Office definition. (Scottish Parliament 2004b, para 29)
For the draft UK Bill the Charity Commission will continue to look at public benefit on a case-by-case basis, again, with recourse to the courts. However with particular regard to fee-charging charities the joint statement from the Home Office and Charity Commission on this issue clarified the position using the principles indicated by the court in the case of Re Resch.¹ (House of Lords, House of Commons, Joint Committee 2004, page 18) These are as follows—

a) both direct and indirect benefits to the public or a sufficient section of the public may be taken into account in deciding whether an organisation does, or can, operate for the public benefit;

b) the fact that charitable facilities or services will be charged for and will be provided mainly to people who can afford to pay the charges does not necessarily mean that the organisation does not operate for the public benefit; and

c) an organisation which wholly excluded poor people from any benefits, direct or indirect, would not be established and operate for the public benefit and therefore would not be a charity.

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

Regulation and Compliance Costs

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

(a) to determine whether bodies are charities,

(b) to keep a public register of charities,

(c) to encourage, facilitate and monitor compliance by charities with the provisions of this Act, and

(d) to identify and investigate apparent misconduct in the administration of charities and to take remedial or protective action in relation to such misconduct.

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

• it has included an additional function to give advice or to make proposals to a Minister of the Crown regarding functions or objectives; and

• in addition to the functions of the Charity Commission, it has a full section outlining the following 4 objectives—
  o the public confidence objective is to increase public trust and confidence in charities
  o The compliance objective is to increase compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities

¹ Re Resch’s Will Trusts (1969) 1 AC 514

providing research and information services to the Scottish Parliament 13
The social and economic impact objective is to enable and encourage charities to maximise their social and economic impact

The accountability objective is to enhance the accountability of charities to donors, beneficiaries and the general public (Draft Charities Bill, Section 5)

Proportionality

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

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

Cross border registration

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

(i) occupy any land or premises in Scotland, or

(ii) carry out activities in any office, shop or similar circumstances in Scotland, and

(c) in making that reference, it also refers to being established under the law of a country or territory other than Scotland.

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

Independence and Governance

The issue of charities and trustees independence comes in two forms; firstly that of the regulators independence; and secondly the independence of the trustees from external control. In the first of these issues the UK and Scottish Bills differ. The draft UK Bill has as one of the functions of the Charity Commission that “the functions of the Commission shall be performed on behalf of the Crown.”(Draft Charities Bill, Section 4) The Scottish Bill has not included a similar function. It should be noted that the Joint Committee have recommended that this be replaced with a statement that the Commission shall be a body independent of government. (House of Lords, House of Commons, Joint Committee 2004, pg 51)
On the second issue the Scottish Bill does not however exclude charity trustees from being appointed by either central or local government. It considers as sufficient the safeguards of section 65 where the trustees are obliged to act in the best interests of the charity and its purposes. An additional part is included in the charity test which stipulates that a charity’s constitution does not expressly permit a third party to direct or control its activities.

**Fundraising**

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

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

**CONCLUSION**

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

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


