Finance Committee

Public Services Reform (Scotland) Bill

Submission from Office of the Scottish Charity Regulator

1. Introduction

1.1 The Office of the Scottish Charity Regulator (OSCR) is established under the Charities and Trustee Investment (Scotland) Act 2005 (“the CTI(S)Act 2005”) as a Non-Ministerial Department, forming part of the Scottish Administration.

1.2 Most provisions of the CTI(S)Act 2005 took effect in April 2006. As from that date, OSCR has statutory functions under the Act:

(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,
(d) to identify and investigate apparent misconduct in the administration of charities and to take remedial or protective action in relation to such misconduct, and
(e) to give information or advice, or to make proposals, to the Scottish Ministers on matters relating to OSCR’s functions.

2. The Principles of Better Regulation

2.1 Since OSCR’s establishment as an Executive Agency in December 2003, we have formally adopted the principles of the Better Regulation Task Force and these principles are included in the CTI(S)Act 2005. In terms of section 1(9) in performing its functions OSCR must, as far as relevant, have regard to:

(a) the principles under which regulatory activity should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed and,
(b) any other principle appearing to OSCR to represent best regulatory practice. In considering this, we have adopted principles of independence, fairness and being informed.

2.2 We welcome the fact that, following the Crerar Review, Scottish Ministers have endorsed the values and principles of public focus, independence, proportionality, transparency and accountability.

2.3 We welcome the policy driver behind the Public Services Reform (Scotland) Bill of creating a proportionate and risk based scrutiny system, although as the regulator of charities rather than local authorities or health or social services, OSCR sits outside much of the current and intended scrutiny framework which is the main focus of the Bill. Nevertheless, there are aspects of the legislation which are of direct relevance to OSCR.
3. **This submission**

3.1 Our evidence is related to two of the key questions posed by the Finance Committee, with some additional comment in relation to Part 6 and Part 7 of the Bill.

4. **Question: Whether the order making powers proposed are appropriate?**

4.1 We recognise that the order making powers in Part 2 of the Bill could be very helpful in allowing the amendment of primary legislation, particularly in specialist areas such as charity law, where it will not always be easy to secure the necessary Parliamentary time for primary legislation.

4.2 In carrying out our function of advising Ministers and reporting to Parliament, we have made a series of Recommendations in our Annual Report, many of which are directed to reducing the burden of administration. One such Recommendation, in relation to Trustee Indemnity Insurance, is already incorporated in Part 7 of the Public Services Reform Bill.

4.3 The introduction of order making powers could therefore be very helpful in so far as it would allow future OSCR Recommendations for changes to the CTI(S)Act 2005 to be introduced without the need for primary legislation, and we would welcome the scope for flexibility and responsiveness which this would introduce.

4.4 Given the scope of the proposed order making powers it is highly appropriate that this should be accompanied by a prior requirement to consult, and the inclusion of this requirement in the Bill is therefore very welcome, for a number of reasons:

- The existing Compact with the voluntary sector and good practice envisages a three month consultation period and we strongly recommend that where charities are potentially affected by proposed changes there should be sufficient time for both the regulator and charities to consider the full impact of such changes.

- The power to remove or reduce burdens on business, the public or the third sector includes the power to amend regulatory and operational requirements of the regulator where these are included in primary legislation. The exercise of such powers has the potential to compromise the operating independence of the regulator or scrutiny body and we would have serious reservations about the impact of such changes without appropriate consideration of how this impacts on the independence of the regulatory body. The requirement to consult as currently framed in the Bill goes some way to address this concern.

- What can be perceived by some as a burden – for example reporting requirements – is seen by others as providing essential elements of accountability and transparency and providing public assurance. This
public assurance was one of the main policy drivers and rationale behind the very recent creation of OSCR. The potential removal of aspects which significantly contribute to public assurance should be the subject of public consultation.

5. **Question:** Whether the proposed duty on listed scrutiny authorities in Part 6 of the Bill is likely to ensure that users of public services are better involved?

We support the principle of user focus in the exercising of scrutiny and regulatory functions, and fully endorse the principle of close engagement and dialogue with all our users and stakeholders. Our principles and process are set out in our *Consultation and Participation Strategy* and we are committed to investing time and effort in understanding and responding to user and stakeholder needs.

However, we have some concerns over how the provisions of Part 6 as currently framed would or could apply to OSCR.

5.1 **The scope of the duty**

5.1.1 Part 6 as we understand it is directed to the involvement of users of services in the scrutiny of those services. From OSCR’s perspective there are two main difficulties with this.

Firstly, OSCR does not directly regulate the service provision by charities. While it is undoubtedly true that charities deliver services to the public, it is not one of OSCR’s functions to scrutinise the delivery of such services by charities. In our regulatory role we do not consider the quality of direct service provision by individual charities. Our focus (as required by the functions set out in the CTI(S)Act 2005) is rather on the governance of the charities, as undertaken by the charity trustees, and on compliance by charities with the provisions of that Act (including meeting the Charity Test).

Modern thinking about governance certainly requires charity trustees to be aware of their responsibilities to their beneficiaries, but it would be a quantum leap in terms of charity governance and indeed charity legislation to create a direct service relationship, between charities and charity trustees on the one hand, and the beneficiaries of the charity on the other, which OSCR was obliged to scrutinise.

Secondly, there are approximately 23,500 charities in Scotland, ranging from small community organisations to very large organisations such as universities and colleges, providing services to users. Looking at clause 92(4) the definition of users of a service is very wide indeed and extends to “persons who will or may use the service in the future”. From the OSCR perspective this is so wide as to include the whole population, since it can be reasonably anticipated that virtually all the population will or may at some time use the services of at least one registered charity in the future.
5.1.2 As a result we are therefore not clear that it is appropriate or helpful for OSCR to be included as a listed scrutiny authority for the duty of user focus as it is currently framed.

5.2 **The governance of the scrutiny body**

5.2.1 In relation to user involvement in governance of scrutiny bodies, the holder of the Office of Scottish Charity Regulator is a corporate body. The Board of the corporate body are appointed via the Public Appointment Process, overseen by OCPAS. Once appointed, Board Members are subject to the normal Nolan principles and a code of conduct approved by Ministers.

5.2.2 From the outset the principle of independence has been interpreted to mean that OSCR must be independent in respect of political intervention by Ministers – secured by establishing OSCR as a Non-Ministerial Department – but also independent of the regulated constituency (charities). Each member of the current OSCR Board is, as it happens, also a charity trustee. Nevertheless, their appointment is as the Board Member of an independent regulator.

5.2.3 As indicated earlier, we endorse and operate according to the principle of close engagement and dialogue with all our users and stakeholders. Our Consultation and Participation Strategy (which can be downloaded at [www.oscr.org.uk/publicationitem.aspx?id=871ad7df-8336-4d8e-9619-456a53a27201](http://www.oscr.org.uk/publicationitem.aspx?id=871ad7df-8336-4d8e-9619-456a53a27201)) clearly and comprehensively describes who we consider our users and stakeholders to be in different contexts and how we will and do involve them in practice. However, we have some concerns about a prescriptive approach to user involvement in governance. This would be particularly so if it were “one size fits all” and did not recognise the very different governance as between – for example – OSCR as a Non-Ministerial Department and HMIE as an Executive Agency.

5.3 **The principle of independence**

5.3.1 The provisions of clause 93 require a listed scrutiny authority to have regard to any guidance in relation to the duty of user focus provided by Scottish Ministers. That guidance may include how to make and what is to be included in arrangements which secure continuous improvement in user involvement. Such a “guidance regime” would appear to undermine the operational independence of scrutiny bodies, running counter to one of the key principles for scrutiny endorsed by Scottish Ministers following the Crerar Review. The proposed role for Ministers to issue guidance is particularly relevant to OSCR, which was specifically constituted as a Non-Ministerial Department, to provide against the potential intervention by Ministers in the operations of the regulator.

5.3.2 We are therefore not clear that it is appropriate OSCR be included as a listed scrutiny authority in this context, particularly given government’s commitment to the principle of independence.
If it were considered appropriate that a duty of user focus be introduced in this way and be applicable to OSCR, then we would suggest that the duty of prior consultation under 93(4) is insufficiently focused and should specifically include the scrutiny bodies affected. Furthermore, we believe that limitations should then be placed on the degree to which Ministers can interfere in the operational independence of a regulator such as OSCR, and suggest that the principles of transparency, accountability and proportionality should prevail in the design of any guidance regime.

6. Part 6: Co-operation between scrutiny bodies

6.1 Clause 94 requires listed scheduled scrutiny authorities to co-operate and co-ordinate activity with each other and where appropriate Scottish Ministers. Since the purpose is improving the exercise of scrutiny functions in relation to local authorities, social services and health services it is appropriate that OSCR is not included within these listed authorities as we do not regulate the provision of such services.

6.2 However the principle of co-operation between regulators is key to our thinking. It is reflected in our strategic objective of minimising the burden of regulation on charities wherever possible, with particular emphasis on reducing multiple reporting. It is also reflected in the series of operational Concordats which we have developed with other regulators and organisations such as the Scottish Housing Regulator and the Charity Commission for England and Wales.

6.3 Section 20 of the CTI(S)Act 2005 requires OSCR, so far as consistent with the proper exercise of its functions, to seek to secure co-operation between it and other relevant regulators, for the purposes of their functions (but not vice versa). It would be in keeping with the principle of ensuring improvements and scrutiny bodies work together if there were a duty of mutual co-operation, and we suggest that consideration be given to a general duty of mutual co-operation in addition to any specific requirements directed to local authorities, social and health services as currently framed.

7. Part 7: Amendments to the Charities and Trustee Investment (Scotland) Act 2005

7.1 Part 7 of the Bill includes amendment to the CTI(S)Act 2005 to allow charities to provide all their trustees with indemnity insurance from charity funds. We very much welcome the inclusion of this provision, which was one of our earliest Recommendations to Ministers. We will be happy to provide further legal justification or underlying evidence of the need for this requirement, but we believe it had wide-spread support from those affected, namely charities and their charity trustees as well as the support of professional advisors who first raised this as an issue.

7.2 In our Annual Report 2008, we included a number of Recommendations on amendments that might be considered to the CTI(S)Act 2005, based on our experience of exercising our functions. The Scottish Government has just...
concluded a consultation on these Recommendations (Proposals for minor amendments to the Charities and Trustee Investment (Scotland) Act 2005 and the Charities Accounts (Scotland) Regulations 2006) and we are hopeful that it will put forward amendments to the Bill following that consultation.

7.3 The majority of our Recommendations, if adopted, would give OSCR additional powers to assist charities in specific circumstances where the CTI(S)Act 2005 does not currently allow us to do so. The need for these powers was not foreseen at the time of the 2005 Act but has been revealed by experience during OSCR’s first three years as regulator. These powers therefore represent a way of achieving a reduction in the regulatory burden created by the CTI(S)Act 2005. These Recommendations specific to OSCR would be very much in keeping with the policy intention of the Public Services Reform (Scotland) Bill and we hope that the Finance Committee will support the introduction of amendments at Stage 2.

Jane Ryder
Chief Executive

John Naylor
Chair