



OSCR – Meeting the Charity Test – Draft Guidance for Consultation

The Royal Society of Edinburgh (RSE), Scotland's National Academy, welcomes OSCR's consultation on the draft guidance for Meeting the Charity Test and the opportunity this provides to comment on some of the issues raised by it.

The following response has been prepared by RSE Fellows who have considerable expertise and involvement in the charity sector, and also includes input from the RSE management group, given the important implications of the draft guidance for the RSE as a charity registered in Scotland.

We recognise that the primary objective of the regulatory framework being established by OSCR is to enhance the confidence of the general public in the way charities operate in Scotland. We believe that OSCR is addressing the considerable challenges involved in setting up a completely new regulatory regime, consistent with the Charities and Trustee Investment (Scotland) Act 2005, despite the legal complexities involved. However, to achieve its objectives and ensure that the charity sector is onside, there are a number of pitfalls that need to be avoided as outlined below.

Although not caused by OSCR, there are also concerns that the 2005 Act has adversely affected the climate for charitable giving from the private sector. Charitable giving replaces or enhances public sector spending with private sector funding. There is a perception by large donors that the 2005 Act included a politically-based attack on part of the charitable sector by the public sector. This has led to the private sector being less inclined to contribute to charities and could have negative implications for the role of the third sector in society.

A. General Comments

1. The Rolling Review work programme

According to OSCR there are over 23,000 active charities registered in Scotland, with the overwhelming majority still to have their charitable status reviewed. This is a necessary process under the 2005 Act, but conducting the Rolling Review will be a substantial, resource-intensive activity, particularly given OSCR's commendable intention of examining every case on its own merits.

In addition to having confidence in the criteria by which OSCR will determine charitable status, there also needs to be more information on how the review will be conducted administratively. The consultation document gives no indication of the process or

timescale for the review, and these aspects need clarification, especially given previous statements from OSCR suggesting that the Rolling Review could take up to 10 years. Whilst we agree with OSCR that those bodies that appear to present specific risks in relation to the charity test should be early priority for review, we are concerned that a protracted climate of uncertainty or dispute over charitable status will adversely impact on the fundraising capabilities of the sector.

2. Connected charities

The draft consultation does not refer to how reviews of connected charities will be conducted. The RSE has two connected charities: The RSE Scotland Foundation and the BP Research Fellowships Trust. Each has a separate entry in the Charity Register. Under Charity Accounting Regulations, RSE group accounts are produced, which include these connected charities, as well as the Society. In conducting the Rolling Review, all charities in the same group should be reviewed together. To do otherwise, will both be inefficient administratively, but also potentially misleading.

3. Cross-border charities

The guidance notes do not appear to recognise that there are charities with cross-border activities (for example, the major medical charities). Having subtly different charity legislation on both sides of the border, each with different regulatory regimes, places cross-border charities in a potentially onerous situation, which, if not handled sensitively, will disadvantage Scotland. OSCR and the Charity Commission are consulting separately over the basis of their charity tests, and to the extent both regulators have discretion, there should be a general presumption against creating divergent approaches on either side of the border, especially in relation to cross border charities. In this respect, it is essential that there is a clear perception that both OSCR and the Charity Commission are seen to be working closely together to minimise any asymmetry between their regulatory frameworks.

The driving force behind the 2005 Act is to improve public confidence in charities. We recognise that OSCR is bound by that Act, but this worthwhile objective will not be served by creating anomalous situations where subtle technical differences lead to the same activity being accepted as charitable in England (and Wales) but not in Scotland, or vice-versa. The degree of concern generated in English charities as a consequence of perceptions of asymmetry and “double jeopardy” needs to be recognised as unhelpful, and steps taken wherever possible to reduce this. Many leading grant-giving charities that distribute funds in Scotland are English-registered but may withdraw from Scottish activity if they believe that this will avoid the complications of having to deal with divergent regulators. Fellows of the Society have experience that suggests this is a real risk. We recommend that if an organisation satisfies the charity test in England and Wales, there should be a general presumption that the organisation will be permitted to operate as a charity in Scotland without the need to undergo onerous scrutiny twice over.

B. Specific comments

1. Charitable purposes

The guidance notes rightly emphasise the importance of Trustees focusing on the main charitable purposes. There should therefore be a clearer distinction made between a primary charitable purpose and secondary charitable activities. For example, an educational charity could be involved in activities concerned with the advancement of culture or science, or the provision of sports or community facilities, but these activities are secondary to its primary educational purpose. This may have implications for the layout of the Annual Return.

In relation to analogous purposes, it could be argued that the approach in the guidance notes does not make full use of the discretion afforded by the 2005 Act for OSCR to recognise an entirely new charitable purpose. Voluntary bodies are often the first to recognise new needs as society evolves.

2. Property distribution

The guidance notes do not deal with the situation where a charity's constitution does not specify what would happen to the assets were the charity ever to be wound up. In reviewing the suitability of a constitution on this aspect, will OSCR require specific distribution arrangements to be made explicit? If so, changing constitutions could be time consuming and expensive, especially for bodies established under Royal Charter, where any changes would need Privy Council approval.

The examples given of problematic definitions of 'charitable' or 'charity' could be made clearer. Denying continuing charitable status because historic constitutions were drafted in hitherto acceptable ways could be harsh.

3. Ministerial control

We recognise that this could be a difficult issue for OSCR as there is an increasing predilection for government to deliver its programmes through third sector agencies. Many Scottish charities now receive a substantial proportion of their funding from Government and these grants are subject to detailed control issued in the name of Ministers. We favour the minimalist approach to the issue of Ministerial control suggested by OSCR as there are many circumstances under which Ministers rely on the third sector. However, we would wish to add that purchaser-provider relationships between Government and charities should be avoided, as the degree of direction and control exerted by Ministers could compromise continuing independence and charitable status.

4. Public v Private benefit

The guidance notes appear to assume that the activities undertaken by charities either confer public benefit **or** private benefit. There are, however, activities that involve both public benefit **and** private benefit. One example is Knowledge Transfer activities by universities, where the exchange and exploitation of knowledge may confer private benefit as well as enable the application of knowledge to the benefit of wider society. It should be

recognised that in a great deal of charitable activity that there will be a continuous spectrum in terms of the relationship between private and public benefit.

5. Disbenefit

In relation to the section on disbenefit, we are pleased that OSCR has adopted the word “harm” to illustrate the extremity of an organisation’s activities before they are considered to cause disbenefit. However, the section on disbenefit is difficult to comprehend and requires clarification.

6. Unduly restrictive conditions

The activities of many charities are funded by legacies and bequests, and these are often given subject to conditions specified by the donor. After accepting such legacies, Trustees have an obligation to adhere to the conditions, which may not accord fully with current norms or values, but reflect those of the time in which the bequests were made. Charities need to be very careful in departing from donors’ wishes, as this could inhibit future donations, and not create the confidence in the charity sector which is the underlying purpose of the legislation.

In deciding whether or not any activities are restrictive, a distinction should be made between those activities supported by the General Funds (or Designated Funds) where the Trustees have considerable discretion, and those activities operating under Restricted Funds. Charity Accounting clearly recognises the difference between these types of Funds. A restriction that arises from a condition specified by the donor should not be presumed as being unduly restrictive, except where it is of such a nature as would readily allow a variation to be granted by the courts to remove the restriction, e.g. because it was now incompatible with legislation (e.g. on discrimination) or contrary to the general ethos of the charity.

7. How to demonstrate public benefit

It is inferred from the guidance notes that when OSCR considers, on the basis of the information provided, that a new applicant would not meet the public benefit requirement or a different aspect of the charity test, that OSCR will generally in the first instance discuss with the applicant how the applicant might restructure its purposes or activities to enable it to meet the requirement. This positive approach is to be commended and it is essential that it is carried out in practice, for both existing charities and applicants. Advice from OSCR, particularly for smaller charities, will be both necessary and welcome. It will, however, be inevitable that some organisations will not be able to satisfy the charity test, notwithstanding advice and assistance from OSCR. In these cases OSCR might have to remove the organisation from the Register.

8. Appeal Process

It is necessary that there is consistency in decision-making and that the process is open and transparent. The same principles should apply to the appeal process and it is important that the route of appeal should be clearly set out. In addition, changing interpretations by raising the bar of the charity test must be avoided.

We understand that the Scottish Charity Appeals Panel is the independent body of appeal for OSCR decisions. However, the present guidance does not appear to contain information on the right of appeal and process. Given the extensive powers of OSCR to regulate charitable activity in Scotland and the need to maintain public confidence, a right of appeal against the decisions of OSCR and the appeal process should be sign-posted in the guidance notes.

Additional Information and References

In responding to this consultation the Society would like to like to draw attention to the following Royal Society of Edinburgh response which is of relevance to this subject: *Draft Charities and Trustee Investment (Scotland) Bill (August 2004)*.

Copies of this response and others can be requested from the RSE's Consultations Officer, Mr. William Hardie (email: evidenceadvice@royalsoced.org.uk). Responses are also published on the RSE website (www.royalsoced.org.uk).

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