

OSCR reports on Rolling Review and public benefit test

The Office of the Scottish Charity Regulator (OSCR) issued its report into Phase 1a of the Rolling Review of all charities at the end of October 2008. In addition to reporting on this phase of the Rolling Review programme, OSCR also published its revised guidance on *Meeting the Charity Test*.

These documents taken together give the charity sector the clearest indication yet of how OSCR will approach the assessment of public benefit both for existing charities and applicants for charitable status.

Results of the rolling review

Phase 1a of the Rolling Review examined 30 existing charities. Of those, 11 were independent schools, four were residential care homes and three were museums. Alongside these, OSCR also examined five membership bodies, including the National Trust for Scotland, and seven randomly selected charities including a major grant-giving trust and some small active charities.

The results of the review produced the following key findings in relation to charity constitutions:-

- One charity had “the promotion of trade and industry” as one of its objects, which is not a charitable purpose in terms of the 2005 Act;
- Some charities’ activities had drifted away to a greater or lesser degree from their objects as set out in their constitutions;
- Six charities’ constitutions defined “charity” or “charitable” in terms of tax law, which does not meet the requirements of the 2005 Act.

Public benefit

In addition, the question of public benefit was considered in some depth, particularly in relation to charities where fees are charged in order to access the benefits they provide. In this Phase of the rolling review, these issues were of primary relevance to residential care services and schools. Amongst the conclusions which OSCR reached were the following:-

- The provision of residential care services is expensive, and the impact of fees and charges can be considerable. However, the costs in the cases reviewed were typical of the sector and in line with external guidelines.

- Assistance with the payment of fees and charges for residential care is determined by primary and secondary legislation.
- A significant number of beneficiaries of residential care charities received assistance in meeting the fees and charges payable.
- In relation to schools, fees and charges varied across the sector to a significant degree.
- Facilitated access arrangements were in place at almost all of the schools reviewed, but the nature and range of those arrangements also varied considerably.
- The number of pupils at schools who received some form of assistance in meeting fees and charges varied both in terms of absolute numbers and the degree of assistance, whether in relation to the cost to the pupil or in relation to the effective cost to the school.

Where charities have been found not to provide public benefit because of unduly restrictive conditions (and in this Phase of the rolling review, this was confined exclusively to school fees), OSCR concluded that means-tested arrangements have the biggest impact in opening up access to the benefits which the charities provide.

The *Meeting the Charity Test* guidance sets out further key pointers in relation to fees and charges as restrictive conditions.

Pointers on restrictive conditions

- The overall approach of OSCR will be to look at access to the benefits provided by a charity, namely whether and to what extent access may be restricted, how the charity responds to mitigate the restriction, and what other mitigating factors exist.
- Fee structures and facilitated access arrangements should be transparent.
- There are no absolute requirements: the decision on how to ensure access is for the charity alone. There are no automatic thresholds to meet and OSCR considers the overall position.
- The greater any fee or charge, the more evidence of facilitated access arrangements will be required by OSCR. Less evidence will be required for small or insignificant fees (although fees which are high when considered cumulatively over time may require closer attention).
- Other benefits provided by the charity for which no charge is made will be taken into account – the scale of the fee will be weighed against the charity's full range of benefits.

Turcan Connell
1 Earl Grey Street
Edinburgh
EH3 9EE

- Facilitated access which is linked to the financial position of the potential beneficiaries are likely to have greatest impact in opening up access, but other types of facilitated access can and will assist.
- Support which comes from unconnected bodies (e.g. from independent grant-making trusts) may still be relevant if the source of funds is reliable.
- A charity making its own funds available to support facilitated access arrangements will be viewed as a positive self-contribution to the provision of a charity's public benefit.
- The cost of providing a service is relevant: charities must be able to cover the costs of providing benefit.

Charities should prepare now for rolling review

There is much useful material to draw on in the rolling review report and in the revised *Meeting the Charity Test* guidance. For charities which have gone through this stage of the rolling review process and been given a direction to amend their constitutions, or to reconsider the way in which they provide benefits to the public, there is work to be done to ensure that charitable status is retained.

For other charities awaiting review, or for applicants for charitable status, there are now clearer benchmarks set down which will serve to guide bodies in determining whether they

too will be able to pass the charity test and to demonstrate that they provide public benefit. Charities which are taking a proactive approach to their preparations for rolling review would do well to consider their own constitutional arrangements now and to give close consideration to how they provide public benefit.

OSCR comments on the future of rolling review

OSCR has announced how it intends to approach remaining phases of the rolling review of the Scottish Charity Register.

In Phase 1b (beginning in January 2009), OSCR will continue to adopt a risk based approach, focussing on risks flagged up in the pilot phase and Phase 1a. In particular, OSCR will continue to examine independent schools and care homes, but will also turn its attention to NHS Endowment Funds, student associations and student unions. Universities will also be examined in Phase 1b.

OSCR also proposes to consider charities with two or more years of zero income or expenditure to determine whether public benefit is being provided.

No single full report on Phase 1b is expected and results will be issued to charities on a rolling basis. OSCR is also exploring whether future stages of rolling review can be built into extended reporting mechanisms, perhaps through trustee reports in charity accounts.

Turcan Connell
1 Earl Grey Street
Edinburgh
EH3 9EE

Scottish Government announces abolition of Charity Appeals Panel

The Scottish Government announced on 6th November the abolition of the Scottish Charity Appeals Panel (SCAP). The announcement by John Swinney MSP, Cabinet Secretary for Finance and Sustainable Growth, is part of a wider review of bodies which scrutinise the provision of public services in Scotland.

Addressing the Scottish Parliament, Mr Swinney said that "although it is important for charities to have an accessible and cost-effective way of appealing OSCR's decisions," the fact that SCAP had only heard two cases in its two years of existence suggested that a specialist standalone body might not be required.

The concept of an appeals panel for the charity sector was an important recommendation of the McFadden Commission's 2001 Report. Recognising that the volume of appeals would be low, McFadden suggested that the appeals body should be an *ad hoc* tribunal, since a separate standing tribunal would not represent value for money.

The policy memorandum on the Scottish Charities and Trustee Investment (Scotland) Bill stated that SCAP was to be an *ad hoc* body under the aegis of the Scottish Committee on the Council for Tribunals. It is not clear from the Parliamentary statement why this cannot continue to be the case.

The Government will issue a consultation paper on future options and, in the meantime, SCAP will continue to exist. As SCAP's existence and functions are governed by the Charities and Trustee Investment (Scotland) Act 2005, any changes require primary legislation. The

Government intends that a public services reform bill will be issued early in 2009 for enacted by 2011. The consultation on a replacement for SCAP is to be managed by the Minister for Community Safety, Fergus Ewing MSP.

Fundraising Standards Board

Fundraising in the charity sector remains subject to self-regulation within the sector itself. The Fundraising Standards Board (FRSB) exists to promote public trust and confidence in fundraising.

By joining the FRSB and the self-regulatory scheme for fundraising, charities and voluntary organisations commit to practising high standards in how they go about raising money. Members are required to apply best practice standards to their fundraising activity and provide a complaints process to address any problems or concerns about their activity. They also display the FRSB tick logo as a mark of reassurance for everyone who gives them money. In return, the FRSB works with its members to help them maintain and improve their own practice and standards across the sector. The FRSB aims to ensure individuals, businesses, grantmakers and others can continue to give with confidence to good causes.

Turcan Connell encourages charities engaged in fundraising to consider whether they can benefit from membership of FRSB. To find out more about the FRSB and how to join, you can contact them on 0845 688 9894 or at infoscotland@frsb.org.uk or www.frsb.org.uk.

**** To receive future copies of this newsletter by email, or to be added to our postal mailing list, send an email with your details to charities@turcanconnell.com**

Turcan Connell
1 Earl Grey Street
Edinburgh
EH3 9EE