

Briefing Note

A Brief Guide to Establishing a
Charity in Scotland

There are just over 24,000 charities in Scotland and every year around 750 to 900 new charities are created. This briefing note sets out some key information on the creation of a new Scottish charity.

Charitable Status

- In order to obtain charitable status in Scotland, an organisation must be entered onto the Scottish Charity Register.
- The Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act) established the Office of the Scottish Charity Regulator (OSCR), which is both the registrar and the regulator of charities in Scotland.
- OSCR is responsible for maintaining the Scottish Charity Register and determining whether or not organisations should be entered onto the Register.
- Charitable organisations can take a number of forms. Many modern private charities, including grant-making foundations, are formed as:
 - Charitable trusts;
 - Scottish Charitable Incorporated Organisations (SCIOs); or
 - Companies limited by guarantee.
- SCIOs were created by the 2005 Act. They are similar to companies in that they provide the benefits of legal personality and limited liability. SCIOs are regulated by OSCR and are not subject to additional regulation by the Registrar of Companies. They have been available for use since 1st April 2011. Registration as a SCIO may be a suitable alternative to a company limited by guarantee for charities which wish to enjoy limited liability.

Applying for Charitable Status

- Applications for entry onto the Scottish Charity Register must be made to OSCR and must set out a number of statutory items of information as well as any other information which OSCR may require or request.
- The application submitted to OSCR must include:
 1. A copy of the body's (draft) constitution.
 2. A business or organisational plan for the body which explains the kinds of activities which it will carry out, how it will carry them out, whether it will apply any conditions or charge fees for access to charitable benefits and, in broad terms, how the proposed new charity will be funded (although detailed cash flow statements are not required).

3. A completed application in a form prescribed by OSCR.
 4. A signed declaration by each of the proposed charity trustees confirming that they are not disqualified from serving as charity trustees and that they understand their duties and obligations under charity law.
- A body will only be entered on the Scottish Charity Register if it meets the charity test.

Applicants should be aware that the process of recognition through OSCR can take up to three months in some cases, and may take longer than three months in complex cases.

The Charity Test

Charitable Purposes

- To meet the charity test, a body must have purposes which consist only of one or more of the charitable purposes defined in the 2005 Act. In addition, the body must provide or intend to provide public benefit in Scotland or elsewhere.
- There are 16 charitable purposes under the 2005 Act. The charitable purposes in Scotland differ slightly from those set out under the law of England and Wales, although the English and Welsh definitions are relevant in Scotland for the purposes of charity tax relief. For that reason, Scottish charities, and UK charities with substantial operations in Scotland (which may be required to register with OSCR as well as the Charity Commission for England and Wales), must ensure that their objects meet both the Scottish and English tests.
- The 16 Scottish charitable purposes listed in the 2005 Act are:-
 - The prevention or relief of poverty;
 - The advancement of education;
 - The advancement of religion;
 - The advancement of health;
 - The saving of lives;
 - The advancement of citizenship or community development;
 - The advancement of the arts, heritage, culture or science;
 - The advancement of public participation in sport;
 - The provision of recreational facilities, or the organisation of recreational activities, with the object of improving the conditions of life for the persons for whom the facilities or activities are primarily intended;
 - The advancement of human rights, conflict resolution or reconciliation;
 - The promotion of religious or racial harmony;
 - The promotion of equality and diversity;
 - The advancement of environmental protection or improvement;
 - The relief of those in need by reason of age, ill-health, disability, financial hardship or other disadvantage;
 - The advancement of animal welfare; or
 - Any other purpose that may reasonably be regarded as analogous to any of the preceding purposes.

Public Benefit

Public benefit is not presumed in any of the defined charitable purposes. It must be demonstrated in each and every case that a body provides or intends to provide public benefit. In doing so, regard must be had as to how any:

1. Benefit gained or likely to be gained by members of the body or any other persons (other than as members of the public); and
2. 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.

In addition, where a benefit is or is likely to be provided to a section of the public only, regard must be had as to whether any condition on obtaining that benefit is unduly restrictive. A condition on obtaining a benefit includes any charge or fee payable to obtain the benefit. Charities must also ensure that they comply with the terms of the Equality Act 2010 or that they fall within the charitable exemption contained in that Act (although OSCR is not solely responsible for checking compliance with equality law).

Other Conditions

Even if a body's purposes consist of only one or more of the defined charitable purposes and the body provides or intends to provide public benefit in Scotland or elsewhere, the body will not meet the charity test unless it can also satisfy a further threefold test:

1. The constitution of the body must not permit distribution of its property for any non-charitable purposes;
2. The body must not have in its constitution provisions which permit direction or control of its activities by the Scottish Ministers or by a Minister of the Crown (unless specifically exempted by Order); and
3. The body must not be a political party or have as one of its purposes the advancement of a political party.

Charity Names

OSCR may refuse to enter an applicant on the Scottish Charity Register if the body has an objectionable name. A name may be objectionable for a number of reasons:

1. It may be the same as, or too like, the name of a pre-existing charity;
2. It may be likely to mislead the public as to the true nature of the purposes of the body or of its activities;
3. It may be likely to give the impression that the body is somehow connected to central or local government when it is not so connected; or
4. It may be offensive.

Charitable companies must also comply with the relevant company law rules on business names.

Tax Reliefs for Charities

Once a charity appears on the Scottish Charity Register, it will normally also qualify for charity tax reliefs. However, this point must always be confirmed by making an application to HM Revenue & Customs (HMRC) for recognition as a charity for tax purposes. To be recognised as a charity for tax purposes, HMRC will expect a Scottish charity:

- To have already been entered on the Scottish Charity Register; and
- To meet the English charity test, which applies in Scotland for tax purposes.

In addition, those managing the charity must pass the fit and proper persons test. This test is designed to ensure that tax reliefs are only given to charities which are managed by persons who are considered fit and proper to do so.

While HMRC recognition is not a foregone conclusion, if a Scottish charity can demonstrate to HMRC that it meets these tax tests, recognition as a charity for tax purposes will normally be backdated to the date on which the charity was entered onto the Scottish Charity Register.

Applicants should be aware that HMRC recognition can take between 10 and 13 weeks in addition to the OSCR application process. Timescales vary depending on HMRC workloads.

Please note that this briefing note is intended as a short summary of the process involved in establishing a charity in Scotland. No responsibility can be accepted for any action taken in reliance on this note and specialist advice should be taken in every case. Turcan Connell would be happy to provide such advice.

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