

## MINUTES

### OSCR BOARD MEETING

Held on 30 May @ 09.30 am

Balmoral Hotel, Edinburgh

**Present:** John Naylor, Chair  
 Frank Kirwan, Deputy Chair  
 Martin Crewe, Board Member  
 Lindsay Montgomery, Board Member  
 Iris McMillan, Board Member  
 Annie Gunner, Board Member

**In attendance:** Jane Ryder, Chief Executive  
 Judith Hayhow, Head of Resource Management  
 Marieke Dwarshuis, Head of Charities  
 Kirsty Gray, Head of Monitoring & Investigations  
 Quentin Fisher, Senior Legal Adviser

		ACTION
1	<p><b>Minutes from previous meeting</b></p> <p>These were agreed</p>	
2	<p><b>Declarations of Interest</b></p> <p>The following were declared at the outset:</p> <p>Chair – Involvement with Scouts, a membership organisation.</p> <p>Deputy Chair – Member of Audit Committee of an international charity which may require to register with OSCR : University lecturer (relevant to University pilot re. fees and possible private benefit of non publicly funded research).</p> <p>Lindsay Montgomery – Currently paying private school fees.</p>	

	<p>Martin Crewe – Director of a charity which charges fees for some activities and has a trading subsidiary.</p> <p>Annie Gunner – Chief Executive of a membership organisation whose members, being charities, charge fees.</p> <p>Iris McMillan – Board member of Learning and Teaching Scotland, a charity subject to directions under s 7.</p>	
3	<p><b>Matters Arising</b></p> <p>Open Meeting – It was agreed that this should be held on 3<sup>rd</sup> September 2007. The Board noted that the preferred venue would be Perth Concert Hall.</p>	
4	<p><b>The Charity Test – Unduly Restrictive Conditions.</b></p>	
4.1	<p>Stemming from the previous Board meeting at which additional information on what constituted Unduly Restrictive Conditions was requested by the Board, the Head of Charities introduced a supplementary paper which dealt with this issue. Board members noted that the consideration of Unduly Restrictive Conditions was one component of the charity Test, the others being Purpose, Constitution and Public Benefit, the rationale behind the latter having been considered and approved by the Board at its meeting the previous evening as were the elements of unduly restrictive conditions other than fees.</p>	
4.2	<p><b>Charges or Fees</b></p> <p>The Chairman reminded the Board that the issue of charges or fees needed to be resolved in a way that covered all charities.</p> <p>In the absence of obvious benchmarks in relation to charges or fees, the Board considered 4 possible rationales for determining the principles which would be applied to Scottish charities in respect of existing and proposed charging arrangements.</p> <p><b>Rationale 1 - Case law</b></p> <p>The Board noted that as UK case law was developed on an issue basis rather than an holistic one, there is little which can be drawn on in respect of specific consideration about when a fee or charge could be deemed to be unduly restrictive as set out in the 2005 Act. The draft public benefit proposals currently being consulted upon by the Charity Commission do not</p>	

address any numerical target for the level or number of people on low incomes that need to benefit before a fee or charge would be considered unduly restrictive; do not set a threshold for maximum fee levels; nor a target or threshold for concessions or other access arrangements. As practice or criteria used in other jurisdictions is similarly vague, the Board concluded that case law would not provide the detailed rationale it sought in respect of fees and charges.

### **Rationale 2 - Statistics and Figures.**

The Board considered how information on low incomes could be used to determine what level of facilitated access mitigates the restriction on access created by a high charge or fee, and concluded that whilst information in respect of the average Scottish Household income (and particularly low incomes) was informative in providing context, it could not be used as a complete rationale for decision making.

Similarly, following discussion on the setting of 'de minimus' levels for fees and charges the Board concluded that whilst this would be operationally attractive in its apparent clarity, it would not take account of individual circumstances, personal choices, the range and variety of over 23,000 charities and could be abused.

The Board did however agree that OSCR should adopt the principle that where fees are low or insignificant less evidence would generally be required from the applicant to allow OSCR to make an assessment in respect of status.

The Board also agreed that a relatively small fee should not be overlooked if the nature of the benefit is such that a small fee will have to be paid on a regular basis in order to benefit fully.

### **Rationale 3 – The cost of providing the benefit.**

The Board considered whether the level of the charge or fee in relation to the cost of providing the benefit could be used as a rationale in determining whether the charge was unduly restrictive. This rationale accepts the fact that charges or fees may be high, since the costs of providing the service are high and fees may thus be restrictive, but this does not address the issue of whether they are unduly so. The Board therefore

**concluded** that whilst the cost of providing the benefit provided important contextual information, it did not of itself form a rationale for determining what could be deemed 'undue'.

**Rationale 4 – The extent to which access to benefit is affected by a fee or charge.**

The Board considered the various arrangements in place to facilitate access for those who may not be able to pay a full fee. Consideration was given to a variety of mechanisms by which this could be quantified e.g. comparison of assisted beneficiaries as a % of total beneficiaries.

It was argued that it is not axiomatic that legislation is concerned to focus only on those with low incomes and ensure they are not excluded. Organisations should be careful how they construct access arrangements not to exclude those on middle incomes. The revenue foregone through any subsidised access has to be recovered by other means, and may result in higher full scale fees, which of themselves further restrict access.

It was concluded that whilst the cumulative impact in terms of the number of individual beneficiaries and the level of assistance they receive was a critical consideration in determining the impact of facilitated access, it should be charities themselves and not OSCR, who should determine their own particular benefit facilitation methodology. As regulator, OSCR may of course ask the charity to demonstrate that the structure chosen is not unduly restrictive.

Similarly, whilst the monetary value of 'assisted access' in the context of total turnover and cost gives useful contextual information, the Board agreed that it would not be appropriate for OSCR to set a rigid framework or formula in respect of this.

Having **agreed** the above, the Board confirmed that the source of funding for facilitated access e.g. whether the money comes from the charity's own funds or another source, would not be considered as a factor on its own in determining accessibility. However where the charity itself was contributing this would be regarded positively. Facilitated access in this context does not include purely personal arrangements such as support from extended family. Charities would, however, be required to ensure that all arrangements for facilitated

	<p>access which either it provided, or were known to it, were publicised. This requirement would apply irrespective of the level of charge.</p> <p>The Board emphasised the importance of sustainability of access arrangements , which should exist beyond the immediate Rolling Review assessment</p> <p>In addition to benefit which is subject to charge, the Board agreed that the levels of, nature and access to any benefit provided by a charity which was <b>not</b> subject to charge is a factor in the assessment. It is not essential for charities to provide any additional benefit, but where there is additional benefit this should be considered as a significant factor in terms of offsetting any restrictions caused by the charging of a fee. Correspondingly, where there is no benefit subject to charge, the level of fee assumes a greater importance. It is was agreed that any benefit, whether or not subject to charge, must be related to the organisation’s charitable purpose</p> <p><b>In light of all of the above considerations, the Board decided that</b></p> <p><b>The proposed OSCR rationale for assessing whether a fee or charge constitutes an unduly restrictive condition is focussed on access and can be summarised as:</b></p> <p><b>‘assessing whether and to what extent, in the context of the cost of providing the service, benefit is provided and access may be restricted’</b></p> <p><b>Use will be made of relevant factual and statistical information to inform a decision as to what level of assistance with access, and what level of indirect benefit should be expected to mitigate the impact of any fee.</b></p>	
5	<p><b>Pilot Results</b></p>	
	<p>In light of the conclusions reached by the Board, it was agreed that there would be merit in considering how the principles agreed should be applied to the Pilot Charities and the Board considered the likely results for the pilot charities and 2 new pending applications on the basis of the agreed rationale and the decision framework.</p> <p>From consideration of the these likely results the</p>	

Board:

- Confirmed that all benefit related to the charitable purpose including that which is not subject to charge is a factor in assessment. It may be the assessment process has not sufficiently considered this
- Confirmed that relatively small recurrent fees should not be overlooked and may be a significant factor in individual assessments, particularly where there are limited free places
- Considered questions of fee structure and the mitigation of fees and whether this should accommodate more explicit targeting at low incomes. The Board concluded that there should be more than tokenistic support for individuals from low income groups.
- The Board considered whether it was sufficient for individuals to be eligible for support or whether it was necessary to demonstrate actual take up. The Board concluded it was not appropriate to require take up- which may well lie outwith the charity's control, but it is essential that access arrangements are transparent.

The Board concluded by a majority that there was a need to state more explicitly in any policy statement the relationship which OSCR expected to see between the size of the fee and the size of (a) any scheme facilitating access, (b) within such a scheme, the profile of those benefiting to ensure the possibility of access, by those from low income groups was not tokenistic and (c) the earlier conclusion (under rationale 4) that the effect of high fees in reducing access to the direct benefits provided by the charity can in principle be mitigated not just by fee waivers and subsidies, but also by the provision of indirect benefits by the charity. This would require more detailed contextual information based on research and modelling. The Board requested the staff to consider this anew for the next meeting.

The Board recognised that the principles and contextual approach agreed for the charity test were complex and extensive. Difficult judgements needed to be made. The Board were concerned:

1. That the basis for decisions needed to be transparent and comprehensible.
2. That workable guidelines were needed and

	<p>more work on this was required.</p> <p>3. That more research was required</p>	
6	<p><b>Chief Executive's Report</b></p> <p>The contents of the Chief Executives report were noted. A one off governance review being carried out by SWIA for a large Scottish charity was highlighted and discussed.</p> <p>The proactive procedures of name and shame followed by removal from the Register 15 months after the submission deadline, after suitable enquiry, for those charities not submitting annual returns and accounts to OSCR was noted and endorsed by the Board.</p> <p>The Chief Executive confirmed that the Charity Commission Concordat was now signed by both parties. The Board had welcomed the opportunity to comment on the draft and were pleased at the outcome. The Concordat with the Scottish Public Service Ombudsman is at final draft. stage</p> <p>The Chairman updated the meeting on his activities since the last Board meeting including participation at the ICAS charities conference and SCVO Gathering, and ongoing liaison with the Scottish Executive particularly with regard to the recruitment of additional Board members. The timing for the advertisements is now likely to be August/September.</p>	
7	<p><b>2007-10 Corporate Plan</b></p> <p>Following the consultation exercise, the Board <b>approved</b> the 2007-10 Corporate Plan for publication.</p>	
8	<p><b>Verbal update on audit and Annual Accounts</b></p> <p>The Head of Resources provided a verbal update that indicated a positive initial review of the 2006-07 accounts by the auditors. Audit fieldwork is commencing within the next week.</p>	
9	<p><b>Equalities Strategy</b></p> <p>With the addition of Human Rights legislation to the list of those Acts which OSCR is subject to the general duties, the Board approved the equalities strategy documented and commended the succinct nature of it. The Chairman noted that it would be followed for the purposes of Board recruitment and noted the action plan for the coming months including Board training.</p>	

10	<p><b>Date and agenda items for next meeting</b></p> <p>The following meeting dates and main topics were agreed:</p> <p>16 June (Edinburgh) – Charity test rolling review  5 July (Dundee) – Monitoring and Voluntary Sector issues  3 September (Perth) – open meeting  3 October (venue and agenda to be confirmed)  27 November (venue and agenda to be confirmed)</p>	
11	The meeting finished at 4.15 p.m.	