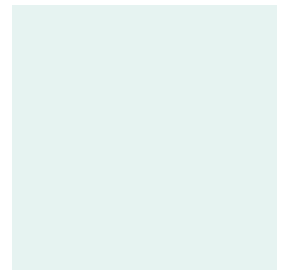


the charity test
a brief guide





introduction

what is this brief guide for?

We have produced this booklet to help people who are new to charities, charity law or charity law in Scotland to understand the **charity test** and how we at the Office of the Scottish Charity Regulator (**OSCR**) apply it. The charity test is part of the Charities and Trustee Investment (Scotland) Act 2005 ('the 2005 Act'), and sets out the requirements which organisations must meet to gain **charitable status** in Scotland.

We hope that this booklet will help:

- » people involved with an organisation applying, or thinking of applying, for charitable status
- » people who are involved with a charity for the first time
- » people acting as **charity trustees** or doing other work within charities, especially smaller ones.

What we aim to provide here is a basic outline of the main points in the charity test and how we apply it. For this reason the explanations and definitions are broadly cast and some important details are not covered. It is not intended to give definitive guidance on the law, its interpretation or OSCR's procedures and should not be relied on as being such. To obtain more detail on a particular point you should consult other sources of information and guidance, such as:

- » the Charities and Trustee Investment (Scotland) Act 2005 – this is the main authority governing charity law in Scotland (available on the Office of Public Sector Information (OPSI) and OSCR websites www.opsi.gov.uk and www.oscr.org.uk)
- » our full-length guidance *Meeting the Charity Test*, available on the OSCR website www.oscr.org.uk and in hard copy on request.

Where there are other sources of guidance on particular points, we mention them as they arise. Where a point continues to cause you uncertainty or confusion you should seek further guidance, for instance from your local Council for Voluntary Service (CVS – for addresses, see the Scottish Council for Voluntary Organisation (SCVO)'s website www.scvo.org.uk) or a professional adviser.

In this booklet we do not cover matters to do with charitable tax relief. These are for Her Majesty's Revenue and Customs (HMRC) to decide and we cannot advise on them. For further information, see their leaflet *Charities in Scotland* and their website www.hmrc.gov.uk/charities



what is charitable status?

To have charitable status in Scotland – that is to be a Scottish charity or a charity registered in Scotland – an organisation must be entered in the Scottish Charity Register. This tells the public (and the tax authorities, funding organisations and people who benefit from an organisation or might be thinking about supporting it) a number of things:

- » the organisation meets the charity test
- » the organisation is regulated or supervised by the Office of the Scottish Charity Regulator (OSCR)
- » its charity trustees (the people who control and manage it) must act in certain ways and provide certain information to OSCR and to the public.

Need to know more? See our *Guidance for Charity Trustees* at www.oscr.org.uk

what is the charity test?

The charity test is set out in the Charities and Trustee Investment (Scotland) Act 2005. Your organisation can only be entered in the Scottish Charity Register and become a charity in Scotland if it passes this test. To pass the test your organisation will have to meet the following requirements:

- » it must have only **charitable purposes**
- » its activities must provide **public benefit** in Scotland or elsewhere.

It will fail the charity test if:

- » its **constitution** allows its property to be distributed or applied for **non-charitable purposes**
- » its constitution expressly permits **government Ministers to control its activities**
- » it is a **political party** or one of its purposes is to advance a political party.

When we look at whether or not your organisation provides **public benefit**, we need to consider whether:

- » there is any **private benefit** from your organisation's activities
- » whether there is any **disbenefit** to the public from its activities
- » whether you put any **unduly restrictive conditions** on accessing the benefit your organisation provides.

In the rest of this guidance we will explain some of these ideas and outline how we make decisions on charitable status.

what is a constitution?

You will see that many of the requirements of the charity test are based on the detail of your organisation's constitution. We need to see the constitution of every organisation which applies for charitable status in Scotland.

By a constitution we mean the document or set of documents which sets up an organisation and says what its purposes are. It will also usually deal with other matters, including who will manage and control the organisation, what their powers are, what they can do with the organisation's money and other assets, and membership of the organisation.

What your organisation's constitution is called and how it is put together will depend on what kind of organisation it is (what its **legal form** is). If it is a company its constitution will be its memorandum and articles of association. If it is a trust its constitution will be a trust deed or similar document. If your organisation is an unincorporated association it may simply be called your constitution.

Need to know more? See the SCVO website www.scvo.org.uk or contact your local Council for Voluntary Service

what are charitable purposes?

Your organisation's purposes are usually set out in the objects, aims, purposes or objectives section of its constitution. The purposes say what your organisation has been set up to achieve, and should reflect its broad aims, not the detailed individual activities it carries out on a day-to-day basis. They should set out your organisation's aims accurately and specifically so that it is clear what it is trying to achieve. For us to be able to accept your organisation's purposes as being charitable depends on whether we can link them clearly to the charitable purposes which are set out in the 2005 Act (see page 4). You do not have to use the wording from the purposes in the Act, as long as it is easy to see from the way you describe your purposes how they relate to the ones in the 2005 Act.



the charitable purposes

the charitable purposes set out in the 2005 Act are as follows (with further comments on some of them):

a. The prevention or relief of poverty.

The prevention of poverty includes preventing those who are poor from becoming poorer, as well as preventing those who are at risk of being poor from becoming poor.

b. The advancement of education.

This covers both formal education, such as that provided through schools and universities, and less formal education in the community.

c. The advancement of religion.

Religion encompasses the worship of one or many gods.

d. The advancement of health (including the prevention or relief of sickness, disease or human suffering).

Health can mean both physical and mental health, and advancing health can include the prevention or relief of sickness, disease or human suffering.

e. The saving of lives.

f. The advancement of citizenship or community development (including rural or urban regeneration and the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities).

g. The advancement of the arts, heritage, culture or science.

h. The advancement of public participation in sport (and 'sport' means sport which involves physical skill and exertion).

i. 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, and only in relation to recreational facilities or activities which are:

(i) primarily intended for persons who have need of them by reason of their age, ill-health, disability, financial hardship or other disadvantage, or

(ii) available to members of the public at large or to male or female members of the public at large.

Activities under this purpose might include provision of a community centre or a youth club or providing facilities for the public to participate in sports or other leisure pursuits.



j. The advancement of human rights, conflict resolution or reconciliation.

k. The promotion of religious or racial harmony.

l. The promotion of equality and diversity.

This includes the elimination of discrimination.

m. The advancement of environmental protection or improvement.

This includes the preservation or conservation of the natural environment or particular parts of it and the promotion of sustainable development.

n. The relief of those in need by reason of age, ill-health, disability, financial hardship or other disadvantage (including relief given by the provision of accommodation or care).

This purpose may be furthered by the provision of care to those in need in a variety of settings, provision of housing for those in need (for instance by housing associations) and by relieving the effects of ill-health.

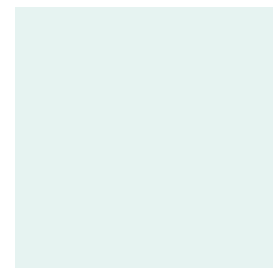
o. The advancement of animal welfare.

p. Any other purpose that may reasonably be regarded as analogous to any of the preceding purposes (and the advancement of any philosophical belief (whether or not involving belief in a god) is analogous to the purpose set out in (c) above).

This allows some flexibility for us to recognise evolving purposes as charitable in the light of changes in society. We might recognise a purpose as analogous where it combines or is like some of the existing purposes in some ways but has new aspects. As well as ‘advancing any philosophical belief’ some other purposes we have recognised on this basis are:

- >> the relief of unemployment
- >> increasing or improving the efficiency of the emergency services.

Need to know more? See our *Meeting the Charity Test* guidance www.oscr.org.uk



what other things in your constitution can stop you from being a charity?

if your organisation wishes to be a charity there are three things that its constitution must not do

1 Your organisation will fail the charity test if its constitution allows it to use any of its property for a purpose which is not a charitable purpose. This applies both when your organisation is being wound up and at any other time. Among other things, there may be a problem if your organisation's constitution:

- » allows its property to be shared out or given to the organisation's members (for instance as a dividend)
- » or makes it possible for your organisation's property to be used for non-charitable purposes if it comes to be wound up or dissolved.

There can be some problems around this requirement to do with how – or whether – your constitution defines what is meant by 'charitable purposes' or similar words. These arise because of the differences between charity law in Scotland, charity law in England and Wales, and UK tax law. To pass the charity test and to qualify for charitable tax reliefs, your organisation's constitution must allow its property to be used only for purposes which are charitable both in Scots law and in UK tax law.

Need to know more? See *Meeting the Charity Test* and the *Joint Statement Defining the phrase 'charitable purpose' or the word 'charitable' in the constitutions of Scottish Charities* produced by OSCR and HMRC www.oscr.org.uk

2 Your organisation will fail the charity test if its constitution expressly permits government ministers to control its activities. We take this to mean that your organisation's constitution must not say that a government minister (that is, a Scottish Minister or a Minister of the Crown):

- » can direct your organisation to do particular things
- » can intervene in your organisation's activities to ensure that they are carried out as he or she wishes.

Need to know more? See *Meeting the Charity Test* or our *Policy Statement on Ministerial Direction and Control* www.oscr.org.uk

3 Your organisation will fail the charity test if it is, or one of its purposes is to advance, a political party. However, your organisation can campaign or lobby or take part in other political activity in order to further its charitable purposes.



what is public benefit?

to pass the charity test an organisation must provide public benefit in Scotland or elsewhere (for a new organisation we can look at whether it intends to provide benefit).

To see whether an organisation provides public benefit we will look at what it does or plans to do to achieve its charitable purposes. What we need to be able to see is that, as a result of the things it does, your organisation will make a positive difference for the public in the ways suggested by its charitable purposes.

Charities can provide benefit in many different ways and in differing amounts. Some benefits are easy to understand and measure. If your organisation sets out to help people with a certain type of disease, for example, it is easy to point to the benefit its activities provide in relieving sufferers' symptoms or curing them. It might be more difficult to measure the benefits of other types of organisation such as those of a religious body or a society preserving a part of our heritage, but that does not mean there is no benefit.

It may be that there is benefit to the public as a whole from some activities, as well as to the people they are directly meant for. An example would be activities which promote literacy and health awareness among women in developing countries: as well as directly benefiting the women concerned, there is indirect benefit to the public at

large in those societies by improving public, especially child, health. But for us to take this into account in the assessment of public benefit, the benefit provided has to be in line with your organisation's purposes. Its constitution will in any case usually require that its assets can only be used for its charitable purposes, and it is a duty of charity trustees to ensure that a charity acts in a manner which is consistent with its purposes.

There is no minimum amount of benefit that must be provided: many charities operate on a small scale or in small communities but are still able to show that what they do provides public benefit.

However, your organisation must actively provide benefit in some way (or intend to provide it). This cannot be the case if there is no activity (though short periods of inactivity may be acceptable where a good reason can be shown for it).

what other things do we have to think about for public benefit?

When we assess whether your organisation provides public benefit there are a number of other aspects which we must look at. These are:

- » whether your organisation will provide any benefit to its members or to anybody else other than as members of the public (we call this **private benefit**)
- » whether your organisation will cause any **disbenefit** to the public by what it does
- » if your organisation provides benefit only to a section of the public, whether any conditions as to who can get that benefit are **unduly restrictive** (this includes any charges or fees).

private benefit

What we need to look at is whether anyone benefits from your organisation's activities as a private individual, rather than as a member of the public, or of the part of the public that your organisation is meant to benefit. An example might be where a trust is set up to restore a historic building belonging to a private individual – clearly the owner of the building, as well as the public, will benefit from the value added by the work the trust does.

Just because there is some private benefit as a result of what your organisation does will not necessarily cause it to fail the charity test. We need to look at the amount of private benefit and whether it is **necessary** and/or **incidental** to how your organisation provides benefit:

- » necessary – where the amount of private benefit involved is required for your organisation to be able to provide benefit
- » incidental – where the private benefit is a secondary result of what your organisation does, rather than being the main point of it.

So, if your organisation pays salaries to staff because it cannot do what it does on a purely voluntary basis, we would be likely to see the private benefit (to the individuals being paid salaries) as necessary to providing the benefit. If in our historic building example we thought that the benefit to the owner was the main reason for setting up the Trust, this would not be incidental, and the application might fail the charity test.

If your organisation has a membership structure you might want to pay particular attention to this issue. If you have to be a member of your organisation to benefit from what it does, and the conditions for becoming a member are **unduly restrictive** then we may not see it as providing public benefit.

disbenefit

Disbenefit is the opposite of benefit and we take it to mean the same as detriment or harm. What we need to look at is whether what your organisation does will cause any disbenefit to the public. If the disbenefit outweighs any benefit your organisation provides, it may fail the charity test.

Like benefit, disbenefit can take a number of forms and differ in the impact it has. It must involve active, identifiable disbenefit to the public, or a relevant part of it, as a result of what your organisation does. The fact that some people might disagree with what your organisation does does not mean there is disbenefit; for that, there would need to be evidence of actual or likely harm, or detriment to the public, not to individuals or to individual organisations. The evidence must relate to what a specific organisation does, not to the effects of that type of organisation.

undue restriction

Rather than benefiting the whole of the public, most charities and organisations applying for charitable status put some kind of limit on who they will benefit. What we have to look at is whether these limits or conditions are **unduly** restrictive. The key word here is **unduly**: if your organisation restricts who can benefit from what it does in some way, that will not by itself mean that it fails the charity test. For that, the restriction would have to be undue – excessively restrictive, or unreasonable or unjustifiable or against general moral or legal standards.

Where a restriction is justifiable in view of an organisation's charitable purposes then it is not likely to be undue. If your organisation aims to help those in poverty or suffering a particular disease, then means testing or selecting patients with a particular diagnosis may be reasonable and justifiable. This is not simply about numbers; it is possible that an organisation operating in a remote rural area might justifiably cater only for a small number of people.

To help us decide what is and is not unduly restrictive we will also look at what the law has to say (for instance, we may look at equalities and anti-discrimination legislation) as well as guidelines set by other regulators, if these are relevant to what a charity or applicant does.

If your organisation makes a charge for benefiting from what it does then this is a restriction on access to the benefit: it restricts access to those who can afford to pay the charge. Again, we need to decide whether the charge amounts to an undue restriction. This is a complex area and if your organisation does charge for what it does you should look at our full guidance. But broadly speaking we apply the following principles:

- » **transparency:** your organisation must be open about any charges it makes and any help available to pay them
- » **no absolute requirements:** it is up to your organisation how it **avoids** undue restriction on access, but the overall decision on whether it does so is for us to make

- » **proportionality:** we will need less evidence to decide about small charges than about large charges, and there will be less need for help in paying them
- » **the full picture:** when we look at public benefit we will bear in mind any benefit your organisation provides that it does not charge for as well as what it does charge for
- » **help available:** where your organisation charges for access to a benefit it provides we expect there to be some kind of help (or 'facilitated access') in place (discounts, fee waivers or bursaries are some of the kinds of help which might count here), or for the organisation to have thought of other means by which to open access to beneficiaries with a wide range of incomes
- » **cost:** we take into account the cost to your organisation of providing the benefit it charges for when we look at whether the charges are unduly restrictive.

is there public benefit?

To assess public benefit, we look at the whole picture of what your organisation does (or plans to do), and the benefit this may provide. We will bear in mind any private benefit, disbenefit or undue restriction. Depending on what your organisation does, some of these factors may not be issues at all, while others may loom large. As a regulator, we must follow good regulatory principles such as proportionality and consistency, and we will apply these in looking at public benefit.

how will we make our decision?

We will decide whether your organisation has charitable purposes by looking at its constitution, and this is also how we will look at use of assets for non-charitable purposes, ministerial control and political purposes. To decide on public benefit we look at what your organisation does or plans to do, and we will look at the information you give us on the application form, and in any other material you send in to support it, like business plans, grant applications or leaflets. We may ask you for more information if we think we need it.

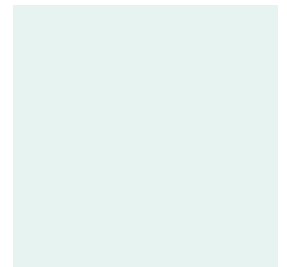
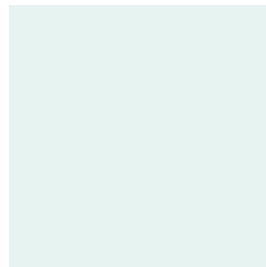
If your organisation passes the test we will enter it on the Scottish Charity Register and let you know its charity number.

If there seems to be a problem with your organisation passing any part of the test we will usually contact you to explain the problem and what might be needed to overcome it. If the issue cannot be resolved and your organisation fails the charity test we cannot enter it on the Scottish Charity Register and will send you a refusal notice.

what if you disagree with our decision?

If you disagree with our decision to refuse charitable status to your organisation you can ask for the decision to be reviewed (though you must do this within 21 days of our sending you the refusal notice). We will let you know the review decision within 21 days of receiving your request. The review decision might be to confirm, vary, revoke or reverse the original decision.

If you are unhappy with the review decision, you can appeal it to the Scottish Charity Appeals Panel (though you must do this within 28 days of our sending you the review decision). The Panel might decide to confirm our decision, to quash it and direct us to do particular things, or ask us to consider our decision again. Its decision can be appealed to the Court of Session.





OSCr

Office of the Scottish **Charity Regulator**

2nd Floor
Quadrant House
9 Riverside Drive
Dundee
DD1 4NY

P. 01382 220446
E. info@oscr.org.uk
W. www.oscr.org.uk

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