



Office of the Scottish **Charity Regulator**

SCIS seminar: update on public benefit

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What I'll cover

- Progress and outcomes of schools reviews
- Key points for schools
- Key points for OSCR
- What else is going on
- Going forward

The charity test

Charities and Trustee Investment (Scotland) Act 2005: to meet the charity test

- Must have charitable purposes
- Must provide public benefit – and there are a number of things OSCR 'must have regard to'

The charity test

Charities and Trustee Investment
(Scotland) Act 2005 Section 8(2)

Must have regard:

'Where benefit is provided to a section of the public only, whether any condition of obtaining that benefit (including any charge or fee) is unduly restrictive.'

Why review charitable status?

2006 – OSCR inherits c.30,000 charities, transferred automatically from HMRC to Scottish Charity Register.

- None of these assessed against charity test
- How ensure confidence in charitable status?
- How increase compliance?

Why schools?

Why were schools a priority?

- Perceived higher likelihood of failing charity test
- Possible undue restriction on access to benefit – fees charged to students

Consultation – part of Pilot reviews

The Story so far - pilot

High School of Dundee – volunteered for pilot reviews

July 2007: found that it passed the charity test

Main points:

- Cost of providing benefit
- Facilitated access
- Transparency
- Other benefits

The Story so far – first phase

October 2008: reviews of 11 schools:

- Six schools passed the charity test
- Five schools failed:
 - Hutchesons' Educational Trust
 - Lomond School Ltd
 - Merchiston Castle School
 - St Leonards School (all public benefit)
 - Jordanhill School (ministerial control)

The story so far - directions

Jordanhill: directed to amend constitution

Other four schools: 3-part directions

- Indicate whether intend to comply with direction or not
- Provide within 1 year a plan to ensure school will be able to meet the public benefit requirement of the charity test
- Within 3 years to meet the objectives of the plan

The story so far - decisions

Jordanhill complied within 12 months

Other four schools – acceptable plans submitted by end October 2009

Reports submitted end October 2009
– all four schools fully complied with directions within timescale

Cargilfield School reviewed 2010-2011 – passed Dec 2011

Main points?

Entirely possible for charities like schools charging substantial fees to avoid undue restriction and pass charity test

Access to benefit for those unable to pay:

- Facilitated access – bursaries, discounts etc
- Benefit which isn't charged-for

Avoiding undue restriction: principles

- Transparency – fees and arrangements to facilitate access need to be clear and well publicised
- No absolute requirements – for the charity trustees to decide how they meet the requirements of the Act – OSCR decides whether they've done so
- Proportionality is a factor – the larger the fee, the more important mitigation is

Avoiding undue restriction: principles

- Cost of provision is relevant
- Where a fee affects access to benefit, we expect some kind of facilitated access or other mitigation to be in place:
 - Provision for a range of incomes, including low incomes
 - Facilitated access clearly linked to beneficiaries' financial situation will have most impact

Avoiding undue restriction: principles

Scale of any fee weighed against full scope of benefits provided – those charged for alongside those not charged for – so we take into account any benefits a charity provides in furtherance of purpose for which it makes no charge

Avoiding undue restriction – in practice

No absolute requirements:

- Charity trustees responsible for operation of school
- nature of the school
- Level of fees
- Context

Avoiding undue restriction – in practice

Full scope of benefits – it's not just about bursaries:

- Partnerships, opening up facilities
- Sports facilities
- Specialist provision – direct or as advice/input
- Collaborative activities – choirs, sports

Not always easy – local authorities

Avoiding undue restriction – in practice

Facilitated Access or mitigation of fees:

- No formula
- needs to address undue restriction - nature of activities, needs of beneficiaries
- Proportionate to level of fees

Overall picture including other activity and whole context

Wider lessons and impressions - OSCR

- Contexts can change
- Outcomes can't always be controlled
- Design of process - timescales
- Design of process – nature of directions

Constructive and impressive responses from schools

Context: Charity Tribunal

ISC judicial review of Charity
Commission of England and Wales
guidance on public benefit

Attorney General's referral

Oct 2011: Charity Tribunal took issue
with aspects of CCEW guidance

Dec 2011: parts of CCEW guidance
withdrawn – being redrafted

Context: Charity Tribunal

Charities and Trustee Investment (Scotland) Act 2005 Section

8(2): sets out what we must have regard to in looking at public benefit (including undue restriction):

Charities Act 2006 (E&W): 'the public benefit as that term is understood for the purposes of the law relating to charities in England and Wales'

Hodgson Review

Review of the Charities Act 2006 (E&W):

Among terms of reference: to look at the recommendations of the Calman Commission – most relevantly, the recommendation that there should be a UK-wide definition of ‘charity’

Ongoing debate – interaction of tax law and law in E&W, NI and Scotland

OSCR has already made recommendations, but will contribute to review

What next?

Evidence of reviews so far: some schools do not fulfil public benefit requirements – so a continuing priority

But not necessarily done in the same way:

Use the information that we already have – eg annual reports

Learn the lessons from previous reviews – including input from you

What should schools do?

- Read our guidance
- Read our published reports – new report 'Protecting Charitable Status' due on 24 January
- Bear principles in mind
- Case studies – what's relevant to our situation?
- Ask us
- Dialogue with SCIS



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