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MINUTES

OSCR Board meeting

Held on Wednesday 27 February at 6pm

At 44 Drumsheugh Gardens, Edinburgh

Present: The Very Reverend Dr Graham Forbes, Chair
 Lindsay Montgomery, Deputy Chair
 Fiona Ballantyne, Board Member
 Annie Gunner Logan, Board Member
 Prof. David Harrison, Board Member
 David Hughes Hallett, Board Member

Apologies: Kaliani Lyle, Board Member

In attendance: W. James Wolffe QC
 Christine O'Neill (Brodies LLP)
 David Robb, Chief Executive
 Martin Tyson, Head of Registration
 Moira Cathcart, Senior Legal Advisor
 Jane Holligan, Board Secretary

		ACTION
1.	Apologies Apologies were received from Kaliani Lyle, Board Member	
2.	Declarations of interest None	
3.	Agenda Item 1: Review The Board reviewed its decision to issue a direction to St Margaret's Children and Family Care Society (SC028551)("the charity") following the charity's request for review under section 74 of the Charities and Trustee	

Investment (Scotland) Act 2005.

In carrying out the review the Board had before it all the material presented during the course of the inquiry into the charity as well as the letter sent on behalf of the charity seeking the review, from McSparran McCormick solicitors, dated 11 February 2013 together with enclosures. The Board also had before it the written advice which it had received from James Wolffe QC which was separate from and independent of the legal advice provided prior to the decision being reviewed. The Board received legal advice from Mr Wolffe and from Ms O'Neill of Brodies LLP during the meeting.

The Head of Registration outlined the scope of the review and decisions available to the Board in terms of section 74 of the 2005 Act. The Board agreed the procedure outlined in the Agenda and noted the tests that it must subject the evidence to before reaching a decision. The Board agreed that, following the conclusion of the review process, Members should sign off the review notice as a fair and accurate representation of its decision before the notice was issued.

The Board first considered whether the charity restricted the provision of benefits to persons who share a "protected characteristic" in terms of the Equality Act 2010 in pursuance of its charitable instrument. The Board discussed evidence obtained during its inquiry and received from the charity. The Board reached the view that the evidence showed that the charity's constitution did not authorise a restriction of provision of adoption services to children on the basis of religious belief. In terms of its constitution, the charity's services are open to anyone.

The Board then discussed whether there was evidence of any discrimination in the provision of services by the charity. It reached the view that in delivering its services the charity did discriminate against people seeking to be assessed by the charity as prospective adoptive parents on the basis of sexual orientation and on the basis of religious belief but that this discrimination did not derive from the charity's constitution. The discrimination arose in the application by the charity of its preferred criteria for selecting prospective parents for consideration. The Board considered that this was direct discrimination by the charity.

Even though it had reached the view that the direct discrimination by the charity was not based on its constitution, the Board went on to discuss whether,

assuming that the identified discrimination was in pursuance of the charity's constitution, whether that discrimination might be justified either under the charity exception or the religious exception in the Equality Act. The Board noted that while the charity itself argued that it qualified for the religious exception, it had been reluctant to argue that it qualified for the charities exception. After discussion, Board members agreed that, in the interests of completeness and fairness, the Board should consider separately whether either of these exceptions might apply.

The Board discussed first eligibility for the charity exception. The Board noted the terms of the exception and had a wide-ranging discussion about what aims could be inferred from the charity's evidence and considered whether these were legitimate. Those included a desire to promote and protect the traditional family and the aim of protecting and promoting the interests of children who require adoption. The Board agreed that while it might accept some inferred aims as legitimate, on balance, the available evidence failed to demonstrate that the use of discrimination was a proportionate means of achieving these and in some instances the means appeared counter-productive to the aims.

The Board then had a discussion about the disadvantage which the charity claimed was addressed by the use of the preferred criteria. That was disadvantage suffered by Roman Catholics who suffer infertility but who cannot, consistently with the teachings of the Catholic Church, have IVF fertility treatment and who may for similar reasons be unable to use other adoption services). The Board was not satisfied the discrimination against same sex couples was necessary to address the identified disadvantage.

The Board also reached the view that the discrimination was not necessary in order for the charity to achieve its charitable purposes.

The Board then looked at Article 9 of the European Convention on Human Rights. Following a discussion of the evidence and the charity's purposes, the Board reached the view that the charity was primarily an adoption service, not a church or religious community, and that Article 9 was not engaged here. The Board further decided that even if Article 9 was engaged, contrary to their views, the unlawful discrimination in the provision of services would not be justified.

The Board then examined the charity's eligibility for the

religious exception in Schedule 23 to the Equality Act. The Board discussed the terms of this statutory exception together with evidence submitted by the charity. The Board considered whether the provisions of paragraph 2(1) of Schedule 23 were capable of applying to the charity. The only provision which the Board considered might possibly be capable of applying to the charity was paragraph 2(1)(d). The Board were of the view however that the charity's purpose was, in summary, to promote the welfare of children and not to enable persons of religion or belief to receive a benefit within the framework of that religion or belief. In addition, the Board noted that neither the charity's purpose nor its activities in practice, restricted the charity's activities or the provision of benefits to those of a Roman Catholic faith. The Board therefore reached the view that the purposes of the charity did not fall within the scope of the religious exception.

The Board, therefore, concluded that the charity discriminates unlawfully and that the two exceptions available to it in terms of the 2010 Act did not apply.

The Board further considered that, having reached this decision, it did not need to explore whether or not the charity was performing a public function in the context of sections 149(2) and 150(5) of the 2010 Act as part of its decision on this review.

Having reached a decision on unlawful discrimination, the Board went on to consider the consequences of its decision on unlawful discrimination in terms of whether the charity met the charity test. It looked at whether the conditions that the charity placed on the benefits it offered were unduly restrictive. Following a detailed discussion of the evidence in this particular case, the Board reached the view that the operation of the preferred criteria had the effect of a restriction on provision of benefit that was unlawfully discriminatory and that it regarded this as unduly restrictive. The Board considered also the comparison of benefits and disbenefits provided by the charity in order to decide if, on balance, the charity provided public benefit. The Board considered in detail the benefits the charity provided. The Board acknowledged that the charity provides substantial benefit and that was demonstrated both by its own submissions and those of third parties. Those benefits included the charity's specialism and success in the placement of sibling groups and hard-to-place children, the number of adoptions completed each year and the quality of the post adoption support provided. The Board explored whether these were benefits that could only be provided by

	<p>this charity and whether there were alternative providers of similar services who did not discriminate. The Board also considered the effects of unlawful discrimination by the charity and found that this amounted to a significant disbenefit to certain people with protected characteristics and to society in general. The Board reached the view that despite the significant benefit provided by the charity, that was outweighed by the disbenefit that resulted from unlawful discrimination. On balance the charity did not provide public benefit and therefore it failed the charity test.</p> <p>The Board then considered again in the round the arguments put forward by the charity against the original decision in respect of which the review had been sought. The Board debated all the points and examined the evidence but did not find that any of the arguments were weighty enough to justify the undue restriction operated by the charity.</p> <p>Finally, the Board explored its duty to be proportionate. It considered that it had been proportionate in reaching its decision but acknowledged that once it reached a decision that a charity did not meet the charity test, the only option allowed to it legally was either to issue a direction or to remove the charity from the Register.</p> <p>The Chair then summarised the main points of the review. He said that the Board's review decision was to confirm its decision to direct the charity to meet the charity test. The Board agreed that the report to the charity communicating this decision should be issued by midnight on Monday.</p>	
<p>4.</p>	<p>Agenda Item 2: Draft guidance on referendum</p> <p>The Board agreed that it would provide comments on the Board Paper on referendum guidance for charities to OSCR staff by the following week.</p>	