

## Meeting the Charity Test Guidance

### Consultation responses

August 2015

We have been given permission to publish the responses listed below.

1. James Macfarlane – Charity Trustee
2. Third Sector, Dumfries and Galloway
3. Voluntary Action East Renfrewshire
4. Anonymous – Charity Trustee
5. Charity Law Association
6. Bishops' Conference of Scotland (Catholic National Endowment Trust)
7. Scottish Charity Finance Group
8. Shirley Otto - Professional Adviser
9. UNISON Scotland
10. Tommy McLean - Charity trustee
11. Scottish Council of Independent Schools (SCIS)
12. Paul M. Conroy – Charity trustee
13. Anonymous
14. Scottish Council for Voluntary Organisations (SCVO)
15. Scottish Federation of Housing Associations (SFHA)
16. Scottish Churches Committee
17. Charity Law Sub-committee, Law Society of Scotland
18. Turcan Connell

# Consultation Response Form

Please help us to analyse the responses to our consultation by completing this form.

Name	<input type="text" value="James Macfarlane"/>
Email address	<input type="text"/>
Charity number (if responding on behalf of a charity)	<input type="text"/>

Choose **one** of the categories which best describes you or the organisation you represent.

**Are you responding as a:**

- Charity trustee
- Charity volunteer
- Charity employee
- Professional Adviser
- Member of the public
- Other, please specify:

Do you agree to your response being made available to the public?

- Yes - please answer A below
- No, not at all - your response will be treated as **confidential**

**A.** Where confidentiality is not requested, we will make your response available to the public on the following basis (please tick only one of the boxes):

- Yes, make my response, name and address all available
- Yes, make my response available, but not my name or address
- Yes, make my response and name available, but not my address

# The Charity Test Guidance: content questions and response form

## Section A: Draft Guidance as a whole

**Question 1:** Are you able to find your way around the draft Guidance?

Yes  No

**Comments:**

Although, I used the PDF not the HTML version.

**Question 2:** Overall, is the draft Guidance clear and easy to understand?

Yes  No

**Comments:**

**Question 3:** Are there any gaps in the draft Guidance? If so, what?

Yes  No

**Comments:**

As per comments below.

**Question 4:** Are the examples used clear and helpful? Are there any others you think should be included?

Yes  No

**Comments:**

**Question 5:** Are the purple links to the explanation of terms helpful? Can you think of any other terms that need explanation?

Yes  No

**Comments:**

**Question 6:** Are there any sections of the draft Guidance that you think could be clearer or require more detail?

**Comments:**

As per comments below.

**Question 7:** If you are familiar with the current [Meeting the Charity Test Guidance](#), which version of the Guidance do you find most helpful and why?

Original Meeting the Charity Test Guidance

Draft Charity Test Guidance

**Comments:**

## Section B: Charitable purposes

**Question 9:** Do you have any comments on the content and/or structure of the charitable purposes section?

Yes  No

**Comments:**

The charitable purposes under the 2005 Act are different to the charitable purposes in England and Wales. It may be helpful for the guidance to inform applicants that their purposes will need to meet both definitions if they wish to obtain charitable status in both jurisdictions. This could prevent a Scottish charity from having to amend its purposes at a later date to comply with the requirements to obtain charitable status in England. Readers could be referred to the cross border charities guidance for further information.

**Question 10:** Is our explanation of the charitable purposes clear?

Yes  No

**Comments:**

**Question 11:** Does the draft Guidance help you to understand the difference between activities and purposes and how OSCR will consider whether activities relate to a particular purpose?

Yes  No

**Comments:**

**Section C:**

**Public benefit  
Private benefit  
Undue restrictions  
Disbenefit**

**Question 12:** Do you have any comments on the content of the above sections in the draft Guidance?

**Question 13:** Do you have any comments on the structure of the above sections in the draft Guidance?

**Question 14:** Do you have any comments on the approach to decision making on the above sections in the draft Guidance?

**Public benefit comments:**

Page 6 – “If you intend to benefit a particular group of people or a particular geographical area, then this should be clearly stated too”. This may be good practice, but is not required under the 2005 Act.

**Private benefit comments:**

Page 63 – “We have particular concerns where the charity trustees of a charity are the people benefiting from it as private individuals.” Such cases must be considered on their merits. Consider the example of a sports club where any member of the public is free to join (and hence receive benefit) but would be considered a charity trustee as the club allows all members a vote on its decisions and has no elected committee, etc. In this case it is entirely appropriate that only the charity trustees receive benefit.

Page 66 – private benefit – “We do not look at the perceived general advantages or disadvantages of a type of organisation, for example the perceived general arguments for or against organisations like Arm’s Length External Organisations (ALEOs) or fee-charging schools.” There is no reason why OSCR should not do this, and no authority from SCAP or the Court of Session that this is correct approach. If the general nature of an organisation provides objective (as opposed to theoretical) disbenefit, then that would be a factor OSCR should take into account.

For example, a smokers’ rights group may have charitable purposes relating to human rights, freedom of expression, civic participation, etc., but would provide considerable public disbenefit in promoting smoking. In this case the type of organisation may be material in determining whether or not it passes the charity test.

**Undue restriction comments:**

Page 71 – “If an organisation’s charges are so high that it is impossible for those who cannot afford them to benefit, and no help is offered to meet those costs, then this would be an undue restriction.” This is not necessarily true. The key word is “undue”, meaning “unwarranted or inappropriate because excessive or disproportionate”. For example, if a charity was to discover a cure for cancer, it may wish to charge thousands of pounds for it. There would therefore be a restriction on who would obtain the benefit. However, the restriction would not be unduly restrictive given the resources the charity had expended developing the cure.

Page 73 – “The charity was limiting its beneficiaries to those who share one of the protected characteristics defined in the Equality Act - disability. However, the law does permit charities to discriminate in this way by limiting the group of people it helps, provided the ‘charities exception’ is met.” Caution should be taken here as the law does not prohibit discrimination against non-disabled people. This is specifically provided in the Equality Act at s13(3). Therefore, the ‘charities exception’ at s193 EA would arise in relation to disability only in limited circumstances. In many cases restrictions imposed by charities are lawful not because of the s193 exception, but because no discrimination issue arises in the first place.

**Disbenefit comments:**

Page 67 – “Any kind of unlawful conduct arising from an organisation’s activities will be disbenefit”. This may need review in light of the decision of SCAP in *Saint Margaret's Children and Family Care Society*. Not all unlawful conduct will provide public disbenefit. Unlawful conduct affecting only one individual will be unlikely to cause public disbenefit.

“We will give more weight to disbenefit arising from unlawful discrimination or harassment when making our decision”. There is no authority for this in the 2005 Act or elsewhere. In any case, unlawful discrimination may be considered an undue restriction.

**Section D: Exceptions (use of assets, ministerial control, party political purposes)**

**Question 15:** Is it clear what the specific exceptions are and what they mean?

**Comments:**

Yes

**Question 16:** If not, how can we clarify these sections?

**Comments:**

**Section E: General**



**Question 17:** Do you have any other comments on the draft Guidance?

**Comments:**

The use of the term “governing document” in the draft guidance is inappropriate. It is not a legal term, and it is unclear where this it has come from. The guidance should use the terminology of the 2005 Act, i.e. “constitution”.

The guidance should make it clear whether something is a requirement under the 2005 Act or a recommendation as to best practice.

I have a number of comments relating to the definitions given in the glossary:

Charity Trustee – The definition gives the impression only committee/board members will be charity trustees. In reality, under the 2005 Act a charity trustee is any person having “general control and management of the administration of a charity”. Charity trustees may not necessarily be part of any formal board or committee, and can include senior members of staff. Conversely, board members may not be charity trustees if their role on the board is “tokenistic” and they do not have de facto “control and management”.

Trustees Annual Report – the duty to prepare accounts and reports is owed by the charity, not the charity trustees.

Legal form – there is a distinction between “company” in the general sense meaning an association of individuals formed together for some common purpose, and companies formed under the Companies Acts.

**Equality Impact Assessment (Separate document available on the [OSCR website](#))**

**Question 18:** Do you think the draft Guidance will have an impact (positive or negative) on any of the protected characteristic groups listed?

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

# Consultation Response Form

Please help us to analyse the responses to our consultation by completing this form.

Name	<input type="text" value="Heather Marshall"/>
Email address	<input type="text" value="heather@thirdsectordumgal.org.uk"/>
Charity number (if responding on behalf of a charity)	<input type="text" value="SC043832"/>

Choose **one** of the categories which best describes you or the organisation you represent.

**Are you responding as a:**

- Charity trustee
- Charity volunteer
- Charity employee
- Professional Adviser
- Member of the public
- Other**, please specify: **Staff member of local TSI both supporting groups directly and staff giving guidance to groups.**

Do you agree to your response being made available to the public?

- Yes** - please answer A below
- No, not at all - your response will be treated as **confidential**

**A.** Where confidentiality is not requested, we will make your response available to the public on the following basis (please tick only one of the boxes):

- Yes, make my response, name and address all available**
- Yes, make my response available, but not my name or address
- Yes, make my response and name available, but not my address

# The Charity Test Guidance: content questions and response form

## Section A: Draft Guidance as a whole

**Question 1:** Are you able to find your way around the draft Guidance?

Yes  No

**Comments:**

**The guidance is very comprehensive with lots of links and pages to navigate which may be off putting to less computer-literate individuals. However, I welcome the level of detail and clarity, with information re-emphasised in appropriate places.**

**Question 2:** Overall, is the draft Guidance clear and easy to understand?

Yes  No

**Comments:**

**I think it improves on the existing guidance, particularly with the explanation of each of the charitable purposes.**

**Question 3:** Are there any gaps in the draft Guidance? If so, what?

Yes  No

**Comments:**

**I would have liked to see something within the private benefit section dealing with benefit to the local economy, which is often something that many groups are looking to accomplish as an outcome of their activities seeing it as important for regeneration and sustainability reasons. It has been my experience that this area is often questioned during the application process. In our region tourism is an important sector of the economy and community groups' activities can often link in with tourism in some way. Giving an example of where community groups have presented that appropriately for their charitable application would be helpful ie making the link between a vibrant local economy and community health and well-being, charitable purposes with activities.**

**Question 4:** Are the examples used clear and helpful?

Yes  No

Are there any others you think should be included? (please provide details below)

**Comments:**

**Please see my comment for question 3.**

**Question 5:** Are the purple links to the explanation of terms helpful?

Yes  No

If you have any suggestions for other terms that need explanation please list them below.

**Comments:**

**Question 6:** Are there any sections of the draft Guidance that you think could be clearer or require more detail?

**Comments:**

**I have nothing to add at this point.**

**Question 7:** If you are familiar with the current [Meeting the Charity Test Guidance](#), which version of the Guidance do you find most helpful and why?

Original Meeting the Charity Test Guidance

Draft Charity Test Guidance

**Comments:**

**Some of the issues which I have become aware of through experience are now more explicitly addressed in the draft guidance. The issues you 'flag up' for new applicants is a very good addition backing up the guidance that we already give to groups.**

## **Section B: Charitable purposes**

**Question 8:** Do you have any comments on the content and/or structure of the charitable purposes section?

Yes  No

**Comments:**

**Question 9:** Is our explanation of the charitable purposes clear?

Yes  No

**Comments:**

**Question 10:** Does the draft Guidance help you to understand the difference between activities and purposes and how OSCR will consider whether activities relate to a particular purpose?

Yes  No

**Comments:**

### **Section C:**

**Public benefit**  
**Private benefit**  
**Undue restrictions**  
**Disbenefit**

**Question 11:** Do you have any comments on the content of the above sections in the draft Guidance?

**Question 12:** Do you have any comments on the structure of the above sections in the draft Guidance?

**Question 13:** Do you have any comments on the approach to decision making on the above sections in the draft Guidance?

**Public benefit comments:**

**No comment**

**Private benefit comments:**

**Please see my response to question 3.**

**Undue restriction comments:**

**No comment**

**Disbenefit comments:**

**No comment**

**Section D: Exceptions (use of assets, ministerial control, party political purposes)**

**Question 14:** Is it clear what the specific exceptions are and what they mean?

**Comments:**

**Yes it is clear.**

**Question 15:** If not, how can we clarify these sections?



**Comments:**

**Not applicable.**

## **Section E: General**

**Question 16:** Do you have any other comments on the draft Guidance?

**Comments:**

**None beyond what I have already given.**

## **Equality Impact Assessment (Separate document available on the OSCR [website](#))**

**Question 17:** Do you think the draft Guidance will have an impact (positive or negative) on any of the protected characteristic groups listed?

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity

- Race
- Religion or belief
- Sex
- Sexual orientation

**Comments:**

**None immediately obvious to me.**

**Thank you very much for taking the time to respond.**

**Please email or post your response to us.**

# Consultation Response Form

Please help us to analyse the responses to our consultation by completing this form.

Name	<input type="text" value="Peter McGhee"/>
Email address	<input type="text" value="Peter.mcghee@va-er.org.uk"/>
Charity number (if responding on behalf of a charity)	<input type="text" value="SC 028103"/>

Choose **one** of the categories which best describes you or the organisation you represent.

**Are you responding as a:**

- Charity trustee
- Charity volunteer
- Charity employee
- Professional Adviser
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- Yes, make my response and name available, but not my address

# The Charity Test Guidance: content questions and response form

## Section A: Draft Guidance as a whole

**Question 1:** Are you able to find your way around the draft Guidance?

Yes  No

**Comments:**

**The inclusion of hyperlinks in the draft guidance proves helpful to navigate your way around the document.**

**Question 2:** Overall, is the draft Guidance clear and easy to understand?

Yes  No

**Comments:**

**Question 3:** Are there any gaps in the draft Guidance? If so, what?

Yes  No

**Comments:**

**Question 4:** Are the examples used clear and helpful?

Yes  No

Are there any others you think should be included? (Please provide details below)

**Comments:**

**The use of the case studies in this Guidance are helpful and clear to understand  
And gives a good practical example of the different charity criteria.**

**Question 5:** Are the purple links to the explanation of terms helpful?

Yes  No

If you have any suggestions for other terms that need explanation please list them below.

**Comments:**

**It is good to get a definition of the terms used in the guidance**

**Question 6:** Are there any sections of the draft Guidance that you think could be clearer or require more detail?

**Comments:**

**Question 7:** If you are familiar with the current [Meeting the Charity Test Guidance](#), which version of the Guidance do you find most helpful and why?

Original Meeting the Charity Test Guidance  Draft Charity Test Guidance

**Comments:**

## Section B: Charitable purposes

**Question 8:** Do you have any comments on the content and/or structure of the charitable purposes section?

Yes  No

**Comments:**

**Question 9:** Is our explanation of the charitable purposes clear?

Yes  No

**Comments:**

**Question 10:** Does the draft Guidance help you to understand the difference between activities and purposes and how OSCR will consider whether activities relate to a particular purpose?

Yes  No

**Comments:**

**Section C:**

**Public benefit**  
**Private benefit**  
**Undue restrictions**  
**Disbenefit**

**Question 11:** Do you have any comments on the content of the above sections in the draft Guidance?

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**Question 13:** Do you have any comments on the approach to decision making on the above sections in the draft Guidance?

**Public benefit comments:**

**Private benefit comments:**

**Undue restriction comments:**

**Disbenefit comments:**



## **Section D: Exceptions (use of assets, ministerial control, party political purposes)**

**Question 14:** Is it clear what the specific exceptions are and what they mean?

**Comments:**

**Question 15:** If not, how can we clarify these sections?

**Comments:**

## **Section E: General**

**Question 16:** Do you have any other comments on the draft Guidance?

**Comments:**

**Equality Impact Assessment (Separate document available on the [OSCR website](#))**

**Question 17:** Do you think the draft Guidance will have an impact (positive or negative) on any of the protected characteristic groups listed?

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

**Comments:**

**Thank you very much for taking the time to respond.**

**Please email or post your response to us.**

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Email address

Charity number (if responding on behalf of a charity)

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- Charity employee
- Professional Adviser
- Member of the public
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- Yes, make my response available, but not my name or address
- Yes, make my response and name available, but not my address

# The Charity Test Guidance: content questions and response form

## Section A: Draft Guidance as a whole

**Question 1:** Are you able to find your way around the draft Guidance?

Yes  No

**Comments:**

**Question 2:** Overall, is the draft Guidance clear and easy to understand?

Yes  No

**Comments:**

**Question 3:** Are there any gaps in the draft Guidance? If so, what?

Yes  No

**Comments:**

**Question 4:** Are the examples used clear and helpful?

Yes  No

Are there any others you think should be included? (please provide details below)

**Comments:**

**Question 5:** Are the purple links to the explanation of terms helpful?

Yes  No

If you have any suggestions for other terms that need explanation please list them below.

**Comments:**

**Question 6:** Are there any sections of the draft Guidance that you think could be clearer or require more detail?

**Comments:**

**Cannot think of anything.**

**Question 7:** If you are familiar with the current [Meeting the Charity Test Guidance](#), which version of the Guidance do you find most helpful and why?

Original Meeting the Charity Test Guidance  Draft Charity Test Guidance

**Comments:**

Very clearly expressed making for easier understanding.

## Section B: Charitable purposes

**Question 8:** Do you have any comments on the content and/or structure of the charitable purposes section?

Yes  No

**Comments:**

**Question 9:** Is our explanation of the charitable purposes clear?

Yes  No

**Comments:**

Very clear.

**Question 10:** Does the draft Guidance help you to understand the difference between activities and purposes and how OSCR will consider whether activities relate to a particular purpose?

Yes  No

**Comments:**

**Section C:**

**Public benefit**  
**Private benefit**  
**Undue restrictions**  
**Disbenefit**

**Question 11:** Do you have any comments on the content of the above sections in the draft Guidance?

**Question 12:** Do you have any comments on the structure of the above sections in the draft Guidance?

**Question 13:** Do you have any comments on the approach to decision making on the above sections in the draft Guidance?

**Public benefit comments:**

**Private benefit comments:**

**Undue restriction comments:**

**Disbenefit comments:**



## **Section D: Exceptions (use of assets, ministerial control, party political purposes)**

**Question 14:** Is it clear what the specific exceptions are and what they mean?

**Comments:**

**Yes.**

**Question 15:** If not, how can we clarify these sections?

**Comments:**

## **Section E: General**

**Question 16:** Do you have any other comments on the draft Guidance?

**Comments:**

**No.**

**Equality Impact Assessment (Separate document available on the [OSCR website](#))**

**Question 17:** Do you think the draft Guidance will have an impact (positive or negative) on any of the protected characteristic groups listed?

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

**Comments:**

**Thank you very much for taking the time to respond.**

**Please email or post your response to us.**

# CHARITY LAW ASSOCIATION RESPONSE TO OSCR CONSULTATION ON DRAFT CHARITY TEST GUIDANCE

## Introduction

The Charity Law Association is a professional body for lawyers and other advisers to the charity sector, and for academics working in this area, with over 970 members throughout the UK.

The members who contributed to working party were:-

Simon Mackintosh, Turcan Connell  
Tom Murray, Gillespie Macandrew  
Professor Gareth Morgan, Sheffield Hallam University  
Natalie Johnson, Wrigleys  
Graeme Bruce, CMS Cameron McKenna

The working party reflects a range of experience of regulation and regulator guidance in both Scotland and England and Wales, with particular experience of large and cross border charities, but also of applying for charitable status in Scotland and in meeting the charity test.

The views expressed are those of the members of the working party and not the Charity Law Association as a whole.

The guidance reads well and is much clearer than the previous guidance, which we recognise was created in the very early stages of OSCR's existence. This is all to be warmly welcomed. We recognise that the guidance is primarily for the non-specialist reader, including the general public and charity trustees or potential charity trustees seeking guidance, as well as professional advisers who are not involved in this area of law on an every day basis. Our comments reflect this understanding.

We have the following preliminary points:-

- The status of the guidance should be explained – in contrast to the CCEW guidance on public benefit, which charities are required to have regard to, it should be made clear that this guidance is not of a statutory nature, although it is the product of OSCR's statutory requirement to consult under Section 9 of the Charities and Trustee Investment (Scotland) Act 2005 (“the 2005 Act”).
- Charities should be reminded to have regard to other regulators' guidance, where relevant to them, such as CCEW or HMRC.
- We considered whether the general discussion on public benefit should be placed before the examination of the individual charitable purposes and public benefit in the context of each one of those. We concluded that the present arrangement, following that of the legislation, is reasonable. It might be helpful if the introduction gave a

flavour of the second element of the charity test, and pointed out that the public benefit testing is not the same in respect of each charitable purpose.

- Some sections, such as those covering urban and rural regeneration and human rights, are very short, and a few more case studies in these areas would help. The case studies are useful in giving some insight into OSCR thinking, although limited in that not all of the information used in the decision making is disclosed in the guidance. If OSCR does not have case studies to use then perhaps some examples of the way in which particular issues would be dealt with, could be included – perhaps drawing on the CCEW guidance in these areas.
- The guidance seems to focus quite substantially on operational charities but in the finalisation of the guidance, it should be remembered that a substantial number of Scottish charities are grant givers which support other charities or charitable purposes directly, and the guidance needs to reflect this type of charitable activity.
- Greater use of cross-referrals within more complex parts of the text would be helpful – for example to Equality Act guidance and the fee charging schools summary report. It would also be helpful for those reviewing a paper copy of this guidance if there were a specific link to a web address rather than simply a click through for those using the guidance online.

We did not always feel that the points highlighted as being particularly relevant to “new applicants” were particularly relevant to them, nor particularly difficult, but perhaps these points are ones that have regularly come up in practice.

We now offer detailed comments under the paragraph headings used by you.

### **Who is this guidance for?**

You might be better in the second bullet point to refer to organisations that “want to be registered as a charity”.

There should be a fourth bullet point indicating that the guidance is also for those who wish to set up a new charity.

### **What is the charity test?**

At this point it would be helpful to explain the structure of the document as covering both purposes and public benefit and that you must consider both together, and further down the paragraph it should be made clear that this is an “on balance” test.

### **What are charitable purposes?**

#### **Page 6:**

We feel that this direction of charities towards a limited list of purposes is not helpful. Grant givers might require quite wide purposes, and if a charity starts off with over-narrow purposes, there would be a requirement to approach OSCR for an amendment to purposes

later on, but possibly not much later. We suggest that prospective charities are encouraged to weigh up the activities they might wish to take on and the purposes they might wish to achieve and draft accordingly.

We feel that your example drafting of purposes is more regulator preference than the law but acknowledge that it is helpful to have an idea of what OSCR will accept and it is helpful to remind readers of the requirement to come specifically within the 2005 Act. Parts of this paragraph veer towards guidance about how to become a charity rather than how to meet the charity test.

## **How we make our decision?**

### **Page 7:**

We thought that it would be OSCR's invariable practice to contact an organisation which seemed to have an issue with passing the charity test, rather than "usually".

The explanation there seems focused in the application process and you ought to make that clear, contrasting it with your approach with an existing charity.

## **Charitable purposes**

Before you go into the individual purposes it would be useful to explain that you will go through these in turn and cross-refer readers to the general public benefit discussion as well as to the particular examples of public benefit in the context of each charitable purpose.

### **(a) The relief of poverty**

Under your examples of activities we feel that the provision of financial grants to the poor should be given greater prominence in the list. It would also be appropriate to refer to making grants to other charities which relieve poverty. It might be appropriate to make some comparison between activities within the UK and outside the UK in the context of measurement and relief of poverty.

There is an issue on how the class of beneficiaries is defined, which we cover in our general discussion of public benefit below.

### **(b) The advancement of education**

We feel that this is a good explanation of the charitable purpose in the context of the discussion of public benefit at a later stage.

Half way down page 12, we do not agree that a charity should always be presenting information in a neutral and balanced way – it might wish to operate in a way which provokes thought and discussion.

In your list of activities you should certainly be including the running of a school or university; and the pre-school example would be better as "providing pre-school or after school education or clubs".

### **(c) The advancement of religion**

The advancement of many religions involves acting according to their tenets, which may well necessarily involve other charitable purposes such as the relief of sickness and the relief of poverty. It is not the case that to carry out the moral teachings of a religion requires specific reference to other charitable purposes and indeed many religious organisations would find it surprising that you specifically required them to extend their purposes to specifically include activities and charitable purposes which are treated by them as part of their religion.

Some reference to the decision of the Charities Appeals Panel in the St Margaret's Case would also be helpful here.

### **(d) The advancement of health**

We feel that this guidance was very UK based. There are examples of health care in the wake of disasters and conflicts which are certainly the relief of human suffering, and disease prevention such as malaria prevention and eradication, and the installation of proper sanitation, should also be covered here.

This guidance might usefully be closer to that of the CCEW.

We were concerned about the first case study and in particular OSCR in some way applying scientific judgement to the application in front of it. We feel that this is clearly a matter for other regulators to determine, and that is not for OSCR to rule out research into areas which have some or a reasonable chance of success. We do agree that in the context of treatment there should be some objective evidence that the proposed treatment works.

### **(e) The saving of lives**

We felt that the examples given here were very UK focussed and some examples of non-UK activities would be usefully given.

We understand that OSCR treats some aspects of armed forces charities as analogous to this heading. If so, this should be mentioned here.

We feel that there is bound to be substantial overlap between this heading and others in the list. For example, disaster relief charities may fall under this heading, the relief of poverty and the advancement of health.

### **(f) The advancement of citizenship or community development**

Generally we felt that this section of the guidance read well.

In the context of provision of the effectiveness or efficiency of charities, the example might be given of a common investment fund type of activity.

In relation to the advancement of community development, the way this is laid out reads like a new purpose so some improvement to the heading is required.

In the context of community development generally and rural or urban regeneration particularly, there are indications that OSCR feels that this is a “poverty” relief purpose but that is not the case and the guidance should be adjusted to make this clear.

There is reference here to “an agreed community plan” but it is not clear how that might be achieved and what the community might be.

In the context of regeneration, to repeat the earlier point, this is not confined to areas of indicators of social or economic depression and there is a very vague reference to “the community” in this context. Evidence of deprivation as indicated by you is not the only sign that there is a need for regeneration.

Having made this specific criticism the working party did like the general approach of this part of the guidance.

### **(g) The advancement of the arts, etc**

The examples of activities did not include actually performing or displaying and these should be included.

#### **What do we mean by advancing heritage?**

A little more detail about the preservation of the built environment might be helpful here – for example if a significant person had lived there. There might be some guidance about preserving the character of an area and also beautiful or unspoilt land.

#### **What do we mean by advancing science?**

Your pilot study into the University of Dundee gave some useful examples of potential private benefit in relation to a research institute and some reference to that or cross reference to it here would be helpful.

### **(h) Sport**

We were generally happy with this section. Examples of activities might include enabling participating in competitions or in the sport itself.

You might usefully, drawing on case study 1, make the point in the general part of the guidance that participation is not to be restricted by ability to play well, but that elite participation in sport is in order if it is part of a wider club. We thought that case study 1 was particularly helpful in making this point.

You might usefully make the point that your case study 3 indicates that there was a wide enough section of the public, and point out that the underlying question is whether there are opportunities for the public to participate.

**(i) Recreational facilities**

We felt that this was a good piece of guidance.

**(j) The advancement of human rights, conflict resolution or reconciliation**

The guidance here was rather short for such an important purpose but presumably there are no OSCR cases of substance to take as examples. We felt that there was a good definition of what human rights would include.

Appropriate activities might include influencing the structures in a particular country, monitoring abuse and providing education. We question why there needs to be reference to “in any part of the world” in this particular heading, as it applies to all public benefit.

You might usefully refer to the CCEW guidance for a more comprehensive list of activities which should be included.

**(k) Religious or racial harmony**

We had no comments on this.

**(l) Equality and diversity**

There is a clear overlap with the human rights purpose here and perhaps that could be recognised in the guidance.

In the examples of activities, it might be helpful to refer to race and gender discrimination more directly.

**(m) Environmental protection or improvement**

In the summary it might be helpful to make it clear that this is not the built environment and explain the cross over with the regeneration purpose.

Under the examples of what this purpose means, there should be some reference to the protection of parkland as well as green spaces and generally the mitigation of threats.

In your example of invasive species, that might be better considered in relation to public disbenefit.

Your example of waste recycling is more an example of an activity rather than a purpose.

**(n) The relief of those in need**

We felt that this section read well.

On page 51 again, some reference to the Equality Act and the charity exemption would be particularly helpful. Explain that if a charity is not Equality Act compliant this would lead to an “undue restriction” decision.



### **(o) Animal welfare**

Your examples of public benefit activities should include the prevention of cruelty.

In general this is an example of public benefit where there is a purely indirect and generally immeasurable (in the sense of not being able to be measured) benefit to society.

We felt that the example of animal welfare organisations having to hold an appropriate licence was not appropriate because the purpose of a zoo is unlikely to be the advancement of animal welfare – it is much more likely to fall under the scientific heading or the conservation of endangered species.

### **(p) Analogous purposes**

We suggest that it is particularly important here to distinguish between what is set out in the Act as analogous purposes to specific headings within the Act, and the decisions which OSCR makes under its general discretion about analogous purposes.

In both cases, though, if there is a statutory extension or a decision on analogous purposes then those should be covered in the guidance under the relevant purpose. They might all usefully be covered together at this section but there should be a cross-reference to them under the relevant purpose.

Given the importance of policing and the armed forces, the explanation here could usefully be extended, and in the same place the basis on which support for the fire and rescue services should be explained.

If OSCR does have any recent decisions which could helpfully be discussed under analogous purposes that would certainly help both the general and specialist reader.

### **Generally**

Acknowledging the readership for which this consultation guidance is intended, if OSCR has internal guidance under these particular headings then it would be helpful to have this made available to the reader who wished to be able to go into more detail about OSCR's practice in particular areas.

## **OSCR CHARITY TEST GUIDANCE**

### **Public benefit**

We are, generally, content with the nature of the guidance offered in this section.

We did consider whether it might be more helpful to deal with the general issues of public benefit before addressing them in the particular context of each specific charitable purpose, but felt that, on balance, following the order of the legislation was acceptable.

We do think that some general introduction to public benefit should be provided. This might usefully be done immediately before the first of the charitable purposes is discussed on page 8, explaining that the charitable purposes will be considered in turn, that there is reference to particular public benefit issues in respect of each one of them, but that there is a more general discussion of public benefit in the second part of the guidance.

We also felt that the summary of the “on balance” test at the top of page 72 would usefully be included as part of your summary at the top of page 57.

While we appreciate that that would involve some repetition, it would help explain the overall nature of the testing at appropriate points in the text. We also suggest that the summary should be expanded, on page 57, to make it clear that the public benefit provided, or intended to be provided, should be in line with the charitable objects.

On page 57, the paragraph starting “Some benefits are easy to understand and measure.....” places, we think, undue emphasis on measurement – for example in the case of religious and animal welfare charities, measurement is very often impossible, but can be recognised in spite of that. We also feel that the final wording of that paragraph is rather negatively put. It might be better to say that the public benefit can be recognised even where, in the case of a society for the preservation of heritage, or a charity for the advancement of religion, the benefits are rather more difficult to assess.

In the following paragraph, the list of indirect benefits might be usefully extended to include other topics such as education and economic wellbeing.

You might also usefully extend that section to refer to your published material on pilot charities to receive legacies, as this is likely to be the most common example of apparently dormant charities.

### **What does public mean?**

In the second paragraph there should be recognition of the limitations arising from resources available.

### **How does the benefit link to charitable purposes?**

Again, we felt that the example of the community theatre group was perhaps rather negatively put. Clearly charities need to apply resources for their own charitable purposes only, but it might be better to say that the collection in aid of another charity would not help the charity’s own assessment of public benefit but not in itself cause a problem. You might usefully point out here that activities purely to raise funds towards other charitable purposes do not in this example count towards public benefit. We would not particularly identify this as a regular problem, but perhaps it is something which OSCR experiences in practice.

We felt that the paragraph in relation to updating charitable purposes might be extended to include charities who feel that other purposes might sit well alongside their existing purposes, and so wish to expand into other related areas.

### **How does a charity demonstrate it provides public benefit?**

Given the audience to which the guidance is addressed it would be helpful if you explained that initially OSCR will assess this in the application for registration, but may carry out themed reviews of particular types of charity at a later date. In your comment on the Trustees Annual Report, you should make it clear to applicants and to charities that OSCR as well as the public uses the Trustees' Annual Report to see how public benefit arises.

### **What does public mean?**

We considered whether it might be appropriate to say more about how a beneficial class is defined but felt that, given the audience to which this is addressed, no further technical explanation would be required.

### **How do we assess public benefit?**

The difficulty here is the different ways in which the word “public” are used within the Section 8 of the 2005 Act. We felt that it would be helpful if, for example in discussing private benefit, you referred to “benefit to anyone other than the benefit they receive as a beneficiary”.

We also felt that at this point in the guidance it should be made clear that it would also apply to charities which were considering amending their purposes under Section 16 of the 2005 Act.

We think that it would be helpful to state that this is an evidence-based test – so that, on balance, there should be evidence that benefit might arise; mere belief that it will arise would not be enough to pass the test.

### **Private benefit**

It is in this area that we find most difficulty in being able to explain clearly the different concepts involved in the overall testing of public benefit. This section might be improved if it was explained that private benefit means something along the lines of benefit otherwise than as a beneficiary – for example as a private individual or a commercial business. This is what private benefit means.

The assessment of private benefit (covered in the first bullet point in the summary) could include third party commercial entities.

Where you explain about an organisation being “set up wholly or mostly for the private benefit of individuals”, we feel that this could and should be more widely stated to reflect the way it in fact operates now, along the lines of “has been set up or in fact operates wholly or mostly for private benefit.....”.

## **What do we mean by private benefit?**

This might usefully be extended to make it clear that all individuals are members of the public and as such, as beneficiaries, benefit to them counts towards public benefit. If you have restated public benefit earlier, then you might usefully say that where there is private benefit to individuals from an organisation's activities, you will regard this as private benefit.

At the end of the first paragraph on page 62, we feel that you could be more definite and substitute "is likely to" for "may".

## **Incidental private benefit**

In the second paragraph, you appear to create a test of necessity for paying staff to work for a charity. We do not think that this is the correct test, otherwise you would force charities down the line of "there is no possible alternative to paying our staff" before feeling confident that this was a proper decision. This might be better stated as saying that "where the Trustees conclude that it is necessary or in the best interests of the charity to pay staff....." The Trustees might reasonably conclude that a charity would operate much better with paid staff, or in more modern premises, without satisfying any test of [absolute] necessity. We feel that some reconsideration of the approach here is required.

When you address the question of charities with membership structures, we feel that you are unduly negative in saying "in most cases this is not a problem" you might be more positive in your approach to membership charities here. You might refer to the cases where a charity has members who are not themselves the beneficiaries of the charity. It appears to us that members might fall into three categories:-

- As beneficiaries
- As supporters/donors
- As receiving incidental benefits

You might usefully cross-refer to your pilot studies, for example, in relation to the National Trust for Scotland.

This section should be extended to cover the position of beneficiary trading – the classic example being therapeutic workshops – which directly advance charitable purposes and which are already fully recognised in the tax system. This is a type of example which the readership for which this guidance is intended would find it helpful to have covered.

## **When is private benefit unlikely to be incidental?**

This section would be improved if there was a clear new heading in relation to remuneration.

We think that your particular concerns will arise not only where the charity trustees are the [only] people benefiting, but also where they are the main people benefiting.

You might usefully extend this guidance to cover the village hall type charity where the committee/trustee body is likely to be drawn substantially from the ranks of the users of the charitable facilities.

We think that if you are going to go into the details of Section 67 in the paragraphs relating to remuneration, there should be more detailed reference to Section 67, for example drawing the distinction between pre and post 2004 constitutions, and making some reference to connected parties.

### **Disbenefit**

In your examples on page 68, you address clearly questions of potential disbenefit. However, in the third paragraph on page 66 you state that disbenefit must be active. You should make it clear that potential for disbenefit will be taken into account in your assessment.

We felt, generally, that this section was helpful. We wondered why you stated that you would give more weight to disbenefit arising from unlawful discrimination or harassment, compared to other (unspecified) types of unlawful behaviour. Is there a particular issue here in mind which ought to be explained more fully? Is this something that you have encountered particularly in practice or has been the subject of complaints to you?

### **How we make our decision?**

We felt that this was in the wrong place and should be either on page 60 or right at the end of this section.

### **Undue restrictions**

We felt that this section read very well and clearly benefits from the work you have done on fee charging charities over the past 9 years.

We thought that it would be helpful if, under the summary, you made the point that if undue restrictions are present then the public benefit test is failed. This point might also usefully be made at the start of the public benefit section of the guidance.

On page 70, in the paragraph starting “We will take into account....” we feel that there should be fuller reference to the Equality Act and signposts at this point to the Equality Act Guidance. Given the intended readership of this guidance, it would be helpful to make particular reference to the position of charities whose purposes are to address inequalities, and to make some specific reference to the charities exemption under the Equality Act.

In relation to the second last paragraph on page 70, covering charities with an unreasonably closed section of the public, we feel that more explanation is required. Although your explanation is a reasonable starting point, and there is no Scottish case law in relation to charities for the relief of poverty and with a link, say, to one particular employer or former employer, there is English case law which may be persuasive in this context. In our view the relief of poverty could be for a group sharing a common link – such as employment or former employment with a single large employer, the Armed Forces and the Civil Service; or a shared trade or profession.

In the last paragraph on page 70, we recognise your wish to have plain language but think that the word “charge” would be preferable for “make people pay” here – because very often

charges are paid on behalf of those who are using a charity's services. Payment on behalf of a beneficiary, by a third party, is an appropriate way of lifting an otherwise undue restriction.

At the top of page 72, again, the point should be made that if there is an undue restriction, then the test is failed.

Page 73 – if you are going to use case study 3, then it would be helpful if you were to say that without this there could be an unduly restrictive condition.

### **Use of assets**

Your case study acknowledges that assets can pass to an organisation which is not a charity provided that the recipient organisation has suitable restrictions in place. Your suggested clauses should, therefore, include a clause which meets the test in terms of locking the assets to charitable purposes within a non-charitable body. We think that you will have appropriate examples from your early Rolling Review work.

### **Ministerial directional control**

We feel that this topic is well explained.

Your note on page 79 might be expanded to include the National Collecting Bodies, which are particularly well known examples of this disapplication.

We are of the view that you should, in this guidance, specifically cover ministerial powers to appoint trustees and the circumstances in which you would be likely to fail the charity test for such organisations.

### **Party political purposes**

We feel that this is clear. If there are any case studies available it would be helpful to have those within the guidance.

These comments are submitted by a working party of the Charity Law Association.

We would be very willing to discuss any aspects of them with you. Please contact Simon Mackintosh at Turcan Connell if you wish to do so.

26th May 2015.

# Consultation Response Form

Please help us to analyse the responses to our consultation by completing this form.

Name	Bishops' Conference of Scotland (Catholic National Endowment Trust)
Email address	tboyle@bcos.org.uk
Charity number (if responding on behalf of a charity)	SCO 16650

Choose **one** of the categories which best describes you or the organisation you represent.

**Are you responding as a:**

- Charity trustee
- Charity volunteer
- Charity employee
- Professional Adviser
- Member of the public
- Other, please specify: Assistant General Secretary

Do you agree to your response being made available to the public?

- Yes - please answer A below
- No, not at all - your response will be treated as **confidential**

**A.** Where confidentiality is not requested, we will make your response available to the public on the following basis (please tick only one of the boxes):

- Yes, make my response, name and address all available
- Yes, make my response available, but not my name or address
- Yes, make my response and name available, but not my address

# The Charity Test Guidance: content questions and response form

## Section A: Draft Guidance as a whole

**Question 1:** Are you able to find your way around the draft Guidance?

Yes  No

**Comments: Yes**

The need to categorise the purposes means that information relevant to more than one purpose may only appear in one and so be missed by respondents.

**Question 2:** Overall, is the draft Guidance clear and easy to understand?

Yes  No

**Comments: Yes**

The legal basis for the Guidance is not explicitly discussed, this may be to the advantage to the general public but not necessarily to knowledgeable professionals.

**Question 3:** Are there any gaps in the draft Guidance? If so, what?

Yes  No

**Comments: Yes**

Since tax relief for Scottish Charities is based on English charitable purposes it would be helpful to mention this. Are there examples which could be given where HMRC has not accepted a Scottish charity as a charity for tax purposes.



**Question 4:** Are the examples used clear and helpful?

Yes  No

Are there any others you think should be included? (please provide details below)

**Comments: No**

The Guidance for 'advancement of religion' needs to be reassessed.

Churches and religious organisations undertake wide and varied activities but all this work is undertaken in the "name of religion". In the St Margaret's adoption case, for example, advancing religion goes way beyond the provision of public worship. Many congregations of different denominations hold 'Poor or Benevolent Funds' which are used for the relief of poverty within the area in which the congregation undertakes its work. These funds are collected and distributed as part of the congregation's work to "advance religion". Although there is another charitable purpose for "the relief of poverty or relief of those in need" the distribution of 'Poor or Benevolent Funds' by congregations and other Church bodies is only done in the "advancement of religion". This "advancement of religion" is not about proselytising but about the religious spirit to be charitable. Similarly, there are the many projects carried out by denominations both at national, regional and congregational level to help those in financial or other need including the running of lunch clubs for pensioners, food banks, groups supporting recovering alcoholics and drug adults. Although the guidance mentions "outreach" it suggests that such work requires to be classed as falling within another charitable purpose which has to be specified in the governing document; this is unacceptable. The particular church in its charity governing document should not need to specify it can relieve poverty or assist those in need, this is implicit in the very existence of the Christian church. Churches can, of course, direct OSCR to various passages in the Bible which underpin the work which churches do by way of mission and outreach to the poor and disadvantaged in society such as for example Matthew 25 verses 37-40 (which was a passage quoted in the St Margaret's case).

The Church in Scotland works in all these areas: advancement of education; the advancement of health; the advancement of arts, heritage, culture, the advancement of human rights, conflict resolution or reconciliation and the promotion of religious or racial harmony but it do so to "advance religion". The guidance should reflect this wider meaning of the advancement of religion.

A large percentage of the charities on the Register have the "advancement of religion" as their only or one of their charitable purposes. It seems strange that there are no case studies given for this charitable purpose, although not unique in the Guidance, we hope does it does not reflect an unease concerning this Charitable Purpose given that the Christian Church has always been at the forefront of promoting the common good in the charitable field.

**Question 5:** Are the purple links to the explanation of terms helpful?

Yes  No

If you have any suggestions for other terms that need explanation please list them below.

**Comments:**

**Question 6:** Are there any sections of the draft Guidance that you think could be clearer or require more detail?

**Comments: Yes**

Case studies for the 'advancement of religion' would be of assistance.

**Question 7:** If you are familiar with the current [Meeting the Charity Test Guidance](#), which version of the Guidance do you find most helpful and why?

Original Meeting the Charity Test Guidance  Draft Charity Test Guidance

**Comments:**

## Section B: Charitable purposes

**Question 8:** Do you have any comments on the content and/or structure of the charitable purposes section?

Yes  No

**Comments: Yes**

Charities often have multiple purposes and the section does not sufficiently reflect this.

**Question 9:** Is our explanation of the charitable purposes clear?

Yes  No

**Comments:**

**Question 10:** Does the draft Guidance help you to understand the difference between activities and purposes and how OSCR will consider whether activities relate to a particular purpose?

Yes  No

**Comments:**

## Section C:

**Public benefit  
Private benefit  
Undue restrictions  
Disbenefit**

**Question 11:** Do you have any comments on the content of the above sections in the draft Guidance?

**Question 12:** Do you have any comments on the structure of the above sections in the draft Guidance?

**Question 13:** Do you have any comments on the approach to decision making on the above sections in the draft Guidance?

**Public benefit comments:**

**Private benefit comments:**

**Undue restriction comments:**

**Disbenefit comments:**

**Section D: Exceptions (use of assets, ministerial control, party political purposes)**

**Question 14:** Is it clear what the specific exceptions are and what they mean?

**Comments:**

**Question 15:** If not, how can we clarify these sections?

**Comments:**

## **Section E: General**

**Question 16:** Do you have any other comments on the draft Guidance?

**Comments:**

**Equality Impact Assessment (Separate document available on the [OSCR website](#))**

**Question 17:** Do you think the draft Guidance will have an impact (positive or negative) on any of the protected characteristic groups listed?

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

**Comments:**

**Thank you very much for taking the time to respond.**

**Please email or post your response to us.**

# Consultation Response Form

Please help us to analyse the responses to our consultation by completing this form.

Name	<input type="text" value="Scottish Charity Finance Group"/>
Email address	<input type="text" value="info@scfg.org.uk"/>
Charity number (if responding on behalf of a charity)	<input type="text" value="SC022533"/>

Choose **one** of the categories which best describes you or the organisation you represent.

**Are you responding as a:**

- Charity trustee
- Charity volunteer
- Charity employee
- Professional Adviser
- Member of the public
- Other, please specify: SCFG - Charity representing charity finance professionals.  
Our response has been collated following a member's meeting, and request for input.

Do you agree to your response being made available to the public?

- Yes - please answer A below
- No, not at all - your response will be treated as **confidential**

**A.** Where confidentiality is not requested, we will make your response available to the public on the following basis (please tick only one of the boxes):

- Yes, make my response, name and address all available
- Yes, make my response available, but not my name or address
- Yes, make my response and name available, but not my address



# The Charity Test Guidance: content questions and response form

## Section A: Draft Guidance as a whole

**Question 1:** Are you able to find your way around the draft Guidance?

Yes  No

**Comments:**

In general, yes.

However, it was felt that page numbers on the contents page, particularly if using a printed version of the document, would be useful. In addition, a general index may be helpful.

It was also felt that on the whole the document is too large and cumbersome, and that some information may be better placed in appendices.

**Question 2:** Overall, is the draft Guidance clear and easy to understand?

Yes  No

**Comments:**

Overall yes, but see later answers for additional comments.

**Question 3:** Are there any gaps in the draft Guidance? If so, what?

Yes  No

**Comments:**

As the document is intended not only for new charities, but also for existing charities, we felt that there should perhaps be more content in relation to ongoing compliance and monitoring, or ongoing operational guidance, including how OSCR may assess existing charities in relation to the charity test.

There is no mention that a charity's purposes are required for HMRC to determine whether or not a charity qualifies for tax relief, and for determining what a charity's primary purpose is in relation to tax reliefs.

It has come to our attention that a number of charities which have had OSCR approval for their charitable purposes and have been allocated a charity number, have then had their application for recognition as a charity by HMRC for tax purposes declined. This has resulted in the charity having to get permission from OSCR to change their charitable purposes, in order to meet the

requirements of HMRC, based on the English charity test.

There was a general feeling that the guidance should, where possible, mirror the Charity Commission's guidance for E&W (and NI) to help to avoid confusion, and to be consistent with English Case law where appropriate.

On p3, the guidance should also be for professionals Independently examining/auditing charity accounts, as it is essential for these professionals to understand what the charity's purposes are.

**Question 4:** Are the examples used clear and helpful?

Yes  No

Are there any others you think should be included? (please provide details below)

**Comments:**

Mostly the examples are helpful. However, it was felt that at least one was a bit tenuous. On p68 there was an example which was described as 'potential disbenefit'. In our discussion, it was felt that his was more likely to have been a situation where the charity wasn't delivering a charitable activity – if the treatment hadn't been proven to be effective. (many conventional treatments also cause serious health problems – but are however, still effective)

In general it was felt that the case studies did assist with interpretation.

This was one area where the group felt that some of the case studies may be more suited to either appendices or a separate website area, where decisions on a variety of cases could be made available. This would allow more case studies to be made available, including controversial/marginal decisions may help inform a new charity or indeed an existing charity which was reviewing its purposes.

Each section has a heading giving which activities might provide public benefit, it may also be useful to have at least some guidance as to what might not!

**Question 5:** Are the purple links to the explanation of terms helpful?

Yes  No

If you have any suggestions for other terms that need explanation please list them below.

**Comments:**

Yes, BUT...

It was felt that it was useful to have access to explanations for words or terms that were not familiar.

However, the method used to do this was cumbersome, as it took you to the glossary page giving all explanations. To go back to the page you were on required use of the back arrow. If the application had opened a new page, leaving the old page still open that would have been better. Better still, would have been a pop-up window (like a speech bubble, as used by HMRC and other organisations) which appears over the text, but allows you to continue reading the existing document.

**Question 6:** Are there any sections of the draft Guidance that you think could be clearer or require more detail?

**Comments:**

It was felt that the sections on Public Benefit/Specific Exceptions should be given more prominence, perhaps even by being moved to closer to the beginning of the document. If a charity does not meet these guidelines, they will fail before they even start to consider the charitable purposes.

It was also felt that there was contradictory guidance regarding activity and purpose. The guidance states, on p5 that the purposes say what your organisation has been set up to achieve, rather than its day to day activities. There are then examples which seem to show activities as part of the object clause. See Q10 for additional information.

There was no information about the consequences of operating outwith stated purposes, which was felt would be helpful.

As examples given are, understandably, limited it was felt that guidance was perhaps inadvertently restrictive.

As mentioned earlier, perhaps a dedicated section on the OSCR website, giving additional case studies which could be added to over time.

**Question 7:** If you are familiar with the current [Meeting the Charity Test Guidance](#), which version of the Guidance do you find most helpful and why?

Original Meeting the Charity Test Guidance

Draft Charity Test Guidance

**Comments:**

The existing document obviously need to be updated, but it was felt, overall that the new draft guidance is too long.

Perhaps a shorted introductory document would be more accessible, with a more detailed document being available only when it is necessary to interrogate further.

The draft guidance document appears to be easier to navigate if using online, due to the hyperlinks. However, there was a feeling that the document needs to be paper-friendly as well.

## Section B: Charitable purposes

**Question 8:** Do you have any comments on the content and/or structure of the charitable purposes section?

Yes  No

**Comments:**

It would be helpful if each of the sections followed exactly the same format. – for example using bullet points to identify activities which could advance/relieve the relevant purpose. For advancing health this has not been done, for example. Including a case study in each section rather than only in one or two would also help with consistency.

**Question 9:** Is our explanation of the charitable purposes clear?

Yes  No

**Comments:**

For most of the purposes, yes.

However, there was concern expressed about ‘regulatory creep’ in relation to a change in the ‘Advancement of Religion’ In this section, it now states that charities where charities are relieving needs of disadvantaged people in line with the teachings or duties of their religion, OSCR now expect those charities to include relief of poverty or relief of those in need. This is a significant change from previous guidance.

If this change does go ahead it would be useful to have additional guidance on which activities would no longer be seen as satisfying the purpose advancing religion, and which may no longer fit that purpose, which under previous guidance were acceptable.

This change has not been highlighted in the consultation document, or in any additional notes provided in relation to changes in the draft guidance.

**Question 10:** Does the draft Guidance help you to understand the difference between activities and purposes and how OSCR will consider whether activities relate to a particular purpose?

Yes  No

**Comments:**

This was felt to be confusing, as good examples of how the charitable purpose might be written have not been given. Some examples showing how to write a purpose without describing activities would be helpful.

Guidance in E&W explains the difference between what a charity does (its purpose) and how it does about doing that. Perhaps using some of that terminology would help.

On the OSCR website, for each charity its charitable objectives are shown, which often bear no relationship to what is also given as its purposes in a different section on the page. This highlights a need to clarify what the difference between charitable activities and purposes are – and how they relate to the charitable objectives clause in a governing document.

**Section C:**

**Public benefit**  
**Private benefit**  
**Undue restrictions**  
**Disbenefit**

**Question 11:** Do you have any comments on the content of the above sections in the draft Guidance?

**Question 12:** Do you have any comments on the structure of the above sections in the draft Guidance?

**Question 13:** Do you have any comments on the approach to decision making on the above sections in the draft Guidance?

**Public benefit comments:**

It was felt that some information should be included here in relation to using financial resources for public benefit, and the requirements/consequences in relation to building up high levels of reserves without spending on charitable activities.

A point was raised that charities should be encouraged (mandatory requirement?) to spend a significant percentage (70%?) of its expenditure on its charitable objectives (which should exclude fundraising and administrative costs)

This was suggested as a means of avoiding the situation where some (poorly managed) charities can spend significant sums on administration and very little on actual charitable activities.

**Private benefit comments:**

More guidance is perhaps necessary in relation to what private benefit means in relation to parties related to trustees, as this is not always understood in relation to other organisations owned by or controlled by Trustees.

**Undue restriction comments:**

**Disbenefit comments:**

In general it was felt that the examples in these sections did add significant clarity – especially in relation to disbenefit, which is not commonly used outwith this context.

**Section D: Exceptions (use of assets, ministerial control, party political purposes)**

**Question 14:** Is it clear what the specific exceptions are and what they mean?

**Comments:**

Yes

**Question 15:** If not, how can we clarify these sections?

**Comments:**

No comments

## **Section E: General**

**Question 16:** Do you have any other comments on the draft Guidance?

**Comments:**

There were a few of our members who had not received any notification of this consultation, even though they do subscribe to the OSCR newsletter. It was felt that more effort should be made to ensure that charities and individuals are made aware that a consultation such as this is being undertaken.

The Survey Monkey questionnaire includes a question on the preferred title of the document – our group preferred “Meeting the Charity Test”.

## **Equality Impact Assessment (Separate document available on the OSCR [website](#))**

**Question 17:** Do you think the draft Guidance will have an impact (positive or negative) on any of the protected characteristic groups listed?

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
  - **Religion or belief**
- Sex
- Sexual orientation



**Comments:**

The definition of the purpose 'Advancement of Religion' and the activities that are acceptable under this purpose, appear to have been narrowed significantly compared to that given in the previous version of the guidance.

This is likely to disadvantage groups with the protected characteristic of Religion or Belief, as it may well impact on the activities of their charity, and how those activities are seen by the wider community. In fact it could have an impact on how religion is seen, as undertaking duties to help the disadvantaged is seen widely as being an integral part of the teaching of a number of different faiths. This could then lead to a negative impact on the individuals undertaking those activities.

No other charitable purpose has been narrowed in this way.

**Thank you very much for taking the time to respond.**

**Please email or post your response to us.**

# Consultation Response Form

Please help us to analyse the responses to our consultation by completing this form.

Name	<input type="text" value="Shirley Otto"/>
Email address	<input type="text" value="shirleyotto@btopenworld.com"/>
Charity number (if responding on behalf of a charity)	<input type="text"/>

Choose **one** of the categories which best describes you or the organisation you represent.

**Are you responding as a:**

- Charity trustee
- Charity volunteer
- Charity employee

Professional Adviser

Member of the public

Management Development Network Scotland Other, please specify:

Do you agree to your response being made available to the public?

Yes - please answer A below

No, not at all - your response will be treated as **confidential**

**A.** Where confidentiality is not requested, we will make your response available to the public on the following basis (please tick only one of the boxes):

Yes, make my response, name and address all available

Yes, make my response available, but not my name or address

Yes, make my response and name available, but not my address

# The Charity Test Guidance: content questions and response form

## Section A: Draft Guidance as a whole

**Question 1:** Are you able to find your way around the draft Guidance?

✓ Yes  No

**Comments:**

**Clear and straightforward**

**Question 2:** Overall, is the draft Guidance clear and easy to understand?

✓ Yes  No

**Comments:**

**The description, definitions and case studies work well**

**Question 3:** Are there any gaps in the draft Guidance? If so, what?

✓ Yes  No

**Comments:**

**Address directly status of providing limited public benefit across a number of headings**

**Question 4:** Are the examples used clear and helpful?

✓ Yes  No

Are there any others you think should be included? (please provide details below)

**Comments:**

**Should discuss contentious decisions about public benefit e.g. social enterprises that pay trustees, have staff on the Board, have only one trustee and that trustee is a local councillor from the parent local authority, users trustees on the board of charity of service they use etc.**

**Question 5:** Are the purple links to the explanation of terms helpful?

✓ Yes  No

If you have any suggestions for other terms that need explanation please list them below.

**Comments:**

**Question 6:** Are there any sections of the draft Guidance that you think could be clearer or require more detail?

**Comments:**

**As what is included in many of the categories it is problematic being clear enough about what activities/ objectives are or are not charitable**

**Question 7:** If you are familiar with the current [Meeting the Charity Test Guidance](#), which version of the Guidance do you find most helpful and why?

Original Meeting the Charity Test Guidance  Draft Charity Test Guidance x

**Comments:**

## Section B: Charitable purposes

**Question 8:** Do you have any comments on the content and/or structure of the charitable purposes section?

✓ Yes  No

**Comments:**

**The examples of types of activities that are charitable reveal how broad some of the categories are. Categories such as poverty, religion, advancement of citizenship are much too board and over inclusive. What would not be declared a charity in the hands of a shrewd lawyer prepared to push the boundaries of charity?**

**Question 9:** Is our explanation of the charitable purposes clear?

Yes  No

**Comments:**

**Clear but problematic**

**Question 10:** Does the draft Guidance help you to understand the difference between activities and purposes and how OSCR will consider whether activities relate to a particular purpose?

✓ Yes  No

**Comments:**

**Clear and after some reflection straightforward**

### **Section C:**

**Public benefit  
Private benefit  
Undue restrictions  
Disbenefit**

**Question 11:** Do you have any comments on the content of the above sections in the draft Guidance?

**Question 12:** Do you have any comments on the structure of the above sections in the draft Guidance?

**Question 13:** Do you have any comments on the approach to decision making on the above sections in the draft Guidance?

**Public benefit comments:**

**These comments relate to Qs 11-13**

**Whilst it is reasonable that each charitable purpose, at core, allows those qualifying to become charities navigating issues about private benefit, undue restrictions and, in particular, disbenefit is impossible for non-specialists. The boundaries to public benefit as drafted are in many cases too broad and at times defy explanation to the general public.**

**Juggling issues about private benefit, undue restrictions and disbenefit is impossible for non-specialists turning public benefit into an esoteric art form. Key to the 2005 Act was that people in Scotland could be confident that charities in Scotland were truly charities. A criteria for a charitable purpose must be that it is self-evident to people in Scotland donating to/ using charities. Registering as a charity is not a right or entitlement.**

**Private benefit comments:**

**Undue restriction comments:**



**Disbenefit comments:**

**Section D: Exceptions (use of assets, ministerial control, party political purposes)**

**Question 14:** Is it clear what the specific exceptions are and what they mean?

**Comments:**

**Yes and exactly how it should be-particularly given the challenges to charity independence in England and Wales**

**Question 15:** If not, how can we clarify these sections?

**Comments:**

## **Section E: General**

**Question 16:** Do you have any other comments on the draft Guidance?

**Comments:**

## **Equality Impact Assessment (Separate document available on the OSCR [website](#))**

**Question 17:** Do you think the draft Guidance will have an impact (positive or negative) on any of the protected characteristic groups listed?

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity

- Race
- Religion or belief
- Sex
- Sexual orientation

**Comments:**

**Thank you very much for taking the time to respond.**

**Please email or post your response to us.**

# Consultation Response Form

Please help us to analyse the responses to our consultation by completing this form.

Name	<input type="text" value="UNISON Scotland"/>
	<input type="text" value="Dave Watson"/>
Email address	<input type="text" value="d.watson@unison.co.uk"/>
Charity number (if responding on behalf of a charity)	<input type="text"/>

Choose **one** of the categories which best describes you or the organisation you represent.

**Are you responding as a:**

- Charity trustee
- Charity volunteer
- Charity employee
- Professional Adviser
- Member of the public
- Other, please specify: Trade Union

Do you agree to your response being made available to the public?

- Yes - please answer A below
- No, not at all - your response will be treated as **confidential**

**A.** Where confidentiality is not requested, we will make your response available to the public on the following basis (please tick only one of the boxes):

- Yes, make my response, name and address all available
- Yes, make my response available, but not my name or address
- Yes, make my response and name available, but not my address

# The Charity Test Guidance: content questions and response form

## Section A: Draft Guidance as a whole

**Question 1:** Are you able to find your way around the draft Guidance?

Yes  No

**Comments:**

**Question 2:** Overall, is the draft Guidance clear and easy to understand?

Yes  No

**Comments:**

**Question 3:** Are there any gaps in the draft Guidance? If so, what?

Yes  No

**Comments:**

**There should be more explicit guidance and rules on governance. We would argue for a clear code of practice on governance that sets out the principles that charities should follow. These might include the levels of transparency over income and expenditure, pay ratios and staffing policies. In addition the minimum requirements in relation to 'member' engagement.**

**Question 4:** Are the examples used clear and helpful?

Yes  No

Are there any others you think should be included? (please provide details below)

**Comments:**

**See above on what is meant by governance.**

**Question 5:** Are the purple links to the explanation of terms helpful?

Yes  No

If you have any suggestions for other terms that need explanation please list them below.

**Comments:**

**Question 6:** Are there any sections of the draft Guidance that you think could be clearer or require more detail?

**Comments:**

**As above.**

**Question 7:** If you are familiar with the current [Meeting the Charity Test Guidance](#), which version of the Guidance do you find most helpful and why?

Original Meeting the Charity Test Guidance

Draft Charity Test Guidance

**Comments:**

NA

## Section B: Charitable purposes

**Question 8:** Do you have any comments on the content and/or structure of the charitable purposes section?

Yes  No

**Comments:**

**Question 9:** Is our explanation of the charitable purposes clear?

Yes  No

**Comments:**

**Question 10:** Does the draft Guidance help you to understand the difference between activities and purposes and how OSCR will consider whether activities relate to a particular purpose?

Yes  No

**Comments:**

### **Section C:**

**Public benefit  
Private benefit  
Undue restrictions  
Disbenefit**

**Question 11:** Do you have any comments on the content of the above sections in the draft Guidance?

**Question 12:** Do you have any comments on the structure of the above sections in the draft Guidance?

**Question 13:** Do you have any comments on the approach to decision making on the above sections in the draft Guidance?

**Public benefit comments:**

**There are a growing number of charities who are really social enterprises and have moved away from the original charitable purpose. This is particularly the case in the voluntary care sector.**

**Their primary source of income is public contracts and their primary function is therefore to deliver those contracted services.**

**It is therefore unclear from the guidance how an organisation defined as a charity differentiates itself from a commercial social enterprise. At present it would be difficult to differentiate a number of care charities delivering public contracts from commercial organisations in the sector, where it not for an explicit absence of profit motive.**



**Private benefit comments:**

**This section does not clearly indicate the activities that might form private benefit.**

**For example, if the management team of a charity awards itself generous salaries and conditions, would that amount to a private benefit?**

**To avoid this, charitable organisations should have to abide by a clearer code of practice on management costs and staffing policies. There is guidance on trustee remuneration, but that does not necessarily reflect the way modern semi-commercial charities operate.**

**There is a significant risk to the genuine charitable sector if a charity gives the impression that they have been captured by their management and primarily exist for that management teams private benefit.**

**Undue restriction comments:**

**Disbenefit comments:**



## **Section D: Exceptions (use of assets, ministerial control, party political purposes)**

**Question 14:** Is it clear what the specific exceptions are and what they mean?

### **Comments:**

#### **The draft guidance says:**

It is open to charities to enter into contracts or agreements with government Ministers, though **charity trustees** must make sure that they are acting in the interests of the charity when doing so.

**While few charities allow ministers to explicitly direct their activities, the guidance is unclear about how far ministers could leverage a charity. For example, for some charities almost all their income comes from public contracts. In these circumstances ministerial control is in practice significant.**

**Other charities have formal or informal rules limiting the amount of public contract revenue they will take, so as not to compromise their independence and charitable purpose.**

**Question 15:** If not, how can we clarify these sections?

**Comments:**

**The rules could explicitly require a funding ratio that maintains a level of independence, or requires other forms of governance.**

**Section E: General**

**Question 16:** Do you have any other comments on the draft Guidance?

**Comments:**

**Equality Impact Assessment (Separate document available on the OSCR [website](#))**

**Question 17:** Do you think the draft Guidance will have an impact (positive or negative) on any of the protected characteristic groups listed?

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership

- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

**Comments:**

**Thank you very much for taking the time to respond.**

**Please email or post your response to us.**

# Consultation Response Form

Please help us to analyse the responses to our consultation by completing this form.

Name	<input type="text" value="Tommy McLean"/>
Email address	<input type="text"/>
Charity number (if responding on behalf of a charity)	<input type="text"/>

Choose **one** of the categories which best describes you or the organisation you represent.

**Are you responding as a:**

Charity trustee

- Charity volunteer
- Charity employee
- Professional Adviser
- Member of the public
- Other, please specify:

Do you agree to your response being made available to the public?

Yes - please answer A below

No, not at all - your response will be treated as **confidential**

**A.** Where confidentiality is not requested, we will make your response available to the public on the following basis (please tick only one of the boxes):

Yes, make my response, name and address all available

Yes, make my response available, but not my name or address

Yes, make my response and name available, but not my address

# The Charity Test Guidance: content questions and response form

## Section A: Draft Guidance as a whole

**Question 1:** Are you able to find your way around the draft Guidance?

✓ Yes  No

**Comments:**

**Question 2:** Overall, is the draft Guidance clear and easy to understand?

✓ Yes  No

**Comments:**

**The new structure is an improvement but I think it will still be difficult for people who are not familiar with dealing with structure and requirements of Charities**

**Question 3:** Are there any gaps in the draft Guidance? If so, what?

Yes  No

**Comments:**

**Question 4:** Are the examples used clear and helpful?

✓ Yes  No

Are there any others you think should be included? (please provide details below)

**Comments:**

**Most of the groups I volunteer with use the advancement of education as one of their main purposes. I would like to see the following examples added to the current list in the draft.**

- a) Provision of a Youth Club offering a varied range of informal learning opportunities.**
- b) Adult Groups offering the opportunities to learn new skills and knowledge.**

**Question 5:** Are the purple links to the explanation of terms helpful?

✓ Yes  No

If you have any suggestions for other terms that need explanation please list them below.

**Comments:**

**Question 6:** Are there any sections of the draft Guidance that you think could be clearer or require more detail?

**Comments:**



**Question 7:** If you are familiar with the current [Meeting the Charity Test Guidance](#), which version of the Guidance do you find most helpful and why?

Original Meeting the Charity Test Guidance  Draft Charity Test Guidance

**Comments:**

The additional information provided will lead people through the process more clearly and give confidence to the applicant. The examples and case studies are very helpful and I hope will be added to over time. I.e. the version printed this summer should not be seen as that's it done and left but should be added to almost as FAQ

## Section B: Charitable purposes

**Question 8:** Do you have any comments on the content and/or structure of the charitable purposes section?

✓ Yes  No

**Comments:**

The language used is still rather formal. Is it possible to make this more everyday language

**Question 9:** Is our explanation of the charitable purposes clear?

✓ Yes  No

**Comments:**

**Question 10:** Does the draft Guidance help you to understand the difference between activities and purposes and how OSCR will consider whether activities relate to a particular purpose?

✓ Yes  No

**Comments:**

### **Section C:**

**Public benefit**  
**Private benefit**  
**Undue restrictions**  
**Disbenefit**

**Question 11:** Do you have any comments on the content of the above sections in the draft Guidance? Yes

**Question 12:** Do you have any comments on the structure of the above sections in the draft Guidance?

**Question 13:** Do you have any comments on the approach to decision making on the above sections in the draft Guidance?

**Public benefit comments:**

**Confusing for anyone not already familiar with the requirements of Becoming a Charity. The requirements can appear daunting and may discourage people from continuing**

**Private benefit comments:**

**Undue restriction comments:**

**Disbenefit comments:**

**Section D: Exceptions (use of assets, ministerial control, party political purposes)**

**Question 14:** Is it clear what the specific exceptions are and what they mean? YES

**Comments:**

**Question 15:** If not, how can we clarify these sections?

**Comments:**

## **Section E: General**

**Question 16:** Do you have any other comments on the draft Guidance?

**Comments:**

## **Equality Impact Assessment (Separate document available on the OSCR [website](#))**

**Question 17:** Do you think the draft Guidance will have an impact (positive or negative) on any of the protected characteristic groups listed?

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity

- Race
- Religion or belief
- Sex
- Sexual orientation

**Comments:**

**Thank you very much for taking the time to respond.**

**Please email or post your response to us.**

# Consultation Response Form

Please help us to analyse the responses to our consultation by completing this form.

Name	<input type="text" value="John Edward"/>
Email address	<input type="text" value="office@scis.org.uk"/>
Charity number (if responding on behalf of a charity)	<input type="text" value="SC018033 (among others)"/>

Choose **one** of the categories which best describes you or the organisation you represent.

**Are you responding as a:**

- Charity trustee
- Charity volunteer
- Charity employee
- Professional Adviser
- Member of the public
- Other, please specify: Umbrella body for group of charities

Do you agree to your response being made available to the public?

- Yes - please answer A below
- No, not at all - your response will be treated as **confidential**

**A.** Where confidentiality is not requested, we will make your response available to the public on the following basis (please tick only one of the boxes):

- Yes, make my response, name and address all available
- Yes, make my response available, but not my name or address
- Yes, make my response and name available, but not my address

# The Charity Test Guidance: content questions and response form

## Section A: Draft Guidance as a whole

**Question 1:** Are you able to find your way around the draft Guidance?

Yes  No

**Comments:**

**Question 2:** Overall, is the draft Guidance clear and easy to understand?

Yes  No

**Comments:**

**Question 3:** Are there any gaps in the draft Guidance? If so, what?

Yes  No

**Comments:**



**Question 4:** Are the examples used clear and helpful? Are there any others you think should be included?

Yes  No

**Comments:**

**Specific reference to the extensive testing of independent schools would be welcome, as it has been a source of particular interest relating to OSCR's work.**

**Question 5:** Are the purple links to the explanation of terms helpful? Can you think of any other terms that need explanation?

Yes  No

**Comments:**

**Question 6:** Are there any sections of the draft Guidance that you think could be clearer or require more detail?

**Comments:**

**Question 7:** If you are familiar with the current [Meeting the Charity Test Guidance](#), which version of the Guidance do you find most helpful and why?

Original Meeting the Charity Test Guidance

Draft Charity Test Guidance

**Comments:**

**Written with the experience of several years of testing and a range of scenarios presented during the process, also written conscious of the greater public interest in the charity test and definitions and methodologies used.**

## Section B: Charitable purposes

**Question 9:** Do you have any comments on the content and/or structure of the charitable purposes section?

Yes  No

**Comments:**

**Question 10:** Is our explanation of the charitable purposes clear?

Yes  No

**Comments:**

**Question 11:** Does the draft Guidance help you to understand the difference between activities and purposes and how OSCR will consider whether activities relate to a particular purpose?

Yes  No

**Comments:**

**Section C:**

**Public benefit  
Private benefit  
Undue restrictions  
Disbenefit**

**Question 12:** Do you have any comments on the content of the above sections in the draft Guidance?

**Question 13:** Do you have any comments on the structure of the above sections in the draft Guidance?

**Question 14:** Do you have any comments on the approach to decision making on the above sections in the draft Guidance?

**Public benefit comments:**

**It would be useful to be clear to readers the extent to which benefit is measured through an individual charity's efforts, as opposed to the perceived impact of a particular sector or group of charities as a whole.**

**Many schools have as their object to 'advance education including, but not limited to, the provisions of a day and/or boarding school (s) or college (s) .... as the Governors may think fit'.**

**As per the document's guidance, schools may also consider they provide public benefit in the sections (g) and (h) as they provide access on their premises and staffed by school staff for local schools to, for instance,**

- a. Community choirs**
- b. Music lessons**
- c. Sports lessons**

**It would be helpful to clarify to what extent this is also recognised as public benefit.**

**Private benefit comments:**

**Undue restriction comments:**

**Disbenefit comments:**

## **Section D: Exceptions (use of assets, ministerial control, party political purposes)**

**Question 15:** Is it clear what the specific exceptions are and what they mean?

**Comments:**

See below.

**Question 16:** If not, how can we clarify these sections?

**Comments:**

It might be useful to clarify the relationship between government bodies such as Education Scotland and the Care Inspectorate and government ministers, to illustrate where “ministerial control” does and does not apply, for instance in the case of school inspections and other measures.

## **Section E: General**

**Question 17:** Do you have any other comments on the draft Guidance?

**Comments:**

The Guidance is a useful and timely addition to the material available to charities and their trustees.

The recent submissions to the Scottish Parliament’s Public Petitions Committee on the nature and definition of charitable status should be used to encourage the wider dissemination of this guidance so that elected members and other interested parties are well aware of the detailed processes and considerations that are undertaken as part of the charity test – so as to reinforce public support for an independent regulator.

**Equality Impact Assessment (Separate document available on the [OSCR website](#))**

**Question 18:** Do you think the draft Guidance will have an impact (positive or negative) on any of the protected characteristic groups listed?

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

**Comments:**

**Thank you very much for taking the time to respond.**

**Please email or post your response to us.**

# Consultation Response Form

Please help us to analyse the responses to our consultation by completing this form.

Name	<input type="text" value="Paul M. Conroy"/>
Email address	<input type="text"/>
Charity number (if responding on behalf of a charity)	<input type="text" value="SC018140"/>

Choose **one** of the categories which best describes you or the organisation you represent.

**Are you responding as a:**

- Charity trustee
- Charity volunteer
- Charity employee
- Professional Adviser
- Member of the public
- Other, please specify:

Do you agree to your response being made available to the public?

- Yes - please answer A below
- No, not at all - your response will be treated as **confidential**

**A.** Where confidentiality is not requested, we will make your response available to the public on the following basis (please tick only one of the boxes):

- Yes, make my response, name and address all available
- Yes, make my response available, but not my name or address
- Yes, make my response and name available, but not my address



# The Charity Test Guidance: content questions and response form

## Section A: Draft Guidance as a whole

**Question 1:** Are you able to find your way around the draft Guidance?

Yes  No

**Comments:**

**Question 2:** Overall, is the draft Guidance clear and easy to understand?

Yes  No

**Comments:**

**Question 3:** Are there any gaps in the draft Guidance? If so, what?

Yes  No

**Comments:**

**It seems unclear as to whether or not a charity can be considered to have more than one primary purpose.**

**Question 4:** Are the examples used clear and helpful?

Yes  No

Are there any others you think should be included? (please provide details below)

**Comments:**

**It would be helpful to give specific consideration to charities whose purpose is the advancement of religion.**

**In relation to this observation, does public benefit and the advancement of religion now have to be linked to other aspects of the charity's activities when the applicant is a Church, such as care, education, welfare, relief of poverty?**

**Question 5:** Are the purple links to the explanation of terms helpful?

Yes  No

If you have any suggestions for other terms that need explanation please list them below.

**Comments:**

**Question 6:** Are there any sections of the draft Guidance that you think could be clearer or require more detail?

**Comments:**

**See above and the answer given to Question 4.**

**Question 7:** If you are familiar with the current [Meeting the Charity Test Guidance](#), which version of the Guidance do you find most helpful and why?

Original Meeting the Charity Test Guidance  Draft Charity Test Guidance

**Comments:**

**Familiarity with the current guidance means we are used to it and have no significant difficulties with it; however, the new version seems generally to be an improvement – on the understanding that consideration is given to the views contained in this response.**

## Section B: Charitable purposes

**Question 8:** Do you have any comments on the content and/or structure of the charitable purposes section?

Yes  No

**Comments:**

As noted above – does public benefit and the advancement of religion now have to be linked to other aspects of the charity's activity – especially where Churches are concerned and inextricably involved in the areas of education, welfare, social care and the relief of poverty?

**Question 9:** Is our explanation of the charitable purposes clear?

Yes  No

**Comments:**

See the comments already made about the public benefit provided by the advancement of religion.

**Question 10:** Does the draft Guidance help you to understand the difference between activities and purposes and how OSCR will consider whether activities relate to a particular purpose?

Yes  No

**Comments:**

**It is unclear whether activities which could be covered by a number of purposes and vice-versa are sufficiently taken into account.**

**Section C:**

**Public benefit  
Private benefit  
Undue restrictions  
Disbenefit**

**Question 11:** Do you have any comments on the content of the above sections in the draft Guidance?

**Question 12:** Do you have any comments on the structure of the above sections in the draft Guidance?

**Question 13:** Do you have any comments on the approach to decision making on the above sections in the draft Guidance?

**Public benefit comments:**

As noted above – does public benefit and the advancement of religion now have to be linked to other aspects of the charity's activity – especially where Churches are concerned and inextricably involved in the areas of education, welfare, social care and the relief of poverty?

**Private benefit comments:**

**Undue restriction comments:**

**Disbenefit comments:**

## **Section D: Exceptions (use of assets, ministerial control, party political purposes)**

**Question 14:** Is it clear what the specific exceptions are and what they mean?

**Comments:**

**Question 15:** If not, how can we clarify these sections?

**Comments:**

## **Section E: General**

**Question 16:** Do you have any other comments on the draft Guidance?

**Comments:**

**Equality Impact Assessment (Separate document available on the OSCR [website](#))**

**Question 17:** Do you think the draft Guidance will have an impact (positive or negative) on any of the protected characteristic groups listed?

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

**Comments:**

**There is a likelihood that as it stands the draft guidance could be used to impact in a negative way on religion and belief groups (specifically Churches).**

**Thank you very much for taking the time to respond.**

**Please email or post your response to us.**

## Consultation Response – Draft Guidance on the Charity Test

In general where possible the guidance provided by OSCR should mirror that provided by the Charity Commission for E&W (and for NI), and be compatible with English Case law where appropriate. There are differences in the law, and in the charitable purposes defined, but where there is a parallel then guidance should be similar.

There is no mention in the document in the need for charitable purposes to be clear in order that HMRC can determine whether or not they are charitable for tax purposes, and for determining what a charity's primary purpose is.

I do have concerns that some charities have had their governing document and charitable objects approved by OSCR, applied to HMRC for registration for tax purposes and been refused that registration as their purposes do not meet the test under English Law. Improvements need to be made to the guidance offered to charities in order to avoid issues such as this arising.

### Charitable Purposes, Activities and Public Benefit

In general there is a significant lack of understanding between what is meant by Charitable Purposes and how they are advanced, and the activities that an organisation may undertake in order to advance any particular purpose – question 9/10 in the response form. I do not think that the draft guidance makes this any clearer.

There appears to be a general feeling in the sector, that drafting wide ranging purposes makes it easier to undertake a range of activities and to expand what a charity may be able to do in the future. However, I think that the lack of understanding of what it means to advance a particular purpose lies behind this view. In Charity Commission guidance, the following guidance is given (<https://www.gov.uk/how-to-write-charitable-purposes>):

#### ***How to write your charity's purposes***

*Your charity's purposes should make it clear:*

- *what outcomes your charity is set up to achieve*
- *how it will achieve these outcomes*
- *who will benefit from these outcomes*
- *where the benefits extend to*

*For example:*

*For the public benefit, the relief and assistance of people in need (**what**) in any part of the world (**where**) who are the victims of war or natural disaster or catastrophe (**who**) by supplying them with medical aid (**how**).*

This is much clearer guidance in terms of what should be contained in a statement of charitable purposes than that given by OSCR – either currently or in the draft guidance.

The following section, also from the same CC guidance, is especially useful in determining what a charity is set up to further, rather than how it goes about doing that:

#### ***Distinguish between 'what' and 'how'***

*Be clear about the difference between 'what' and 'how' when you write your purposes. For example, if advancing education is 'what' your charity is set up to achieve:*

*advancing education for the public benefit [**what**] by the provision of a school [**how**] for children aged 5 to 11 [**who**] living in x place [**where**]*

*But if education is a way you advance another charitable purpose, it's 'how' not 'what':*

*advancing health for the public benefit [**what**] by educating [**how**] the public [**who**] about the health risks of smoking*



The draft guidance is not as clear as it could be in this respect and in general within the sector in Scotland it is not well understood. In fact I think that the draft guidance could lead someone to conclude that a charity operating under the second example above, would also be advancing education, even though that is not the case. It may be providing a secondary (or knock-on) public benefit of increasing education of the public in a particular aspect of their health, but the actual purpose that it is set up to advance remains advancing health. There are a number of places within the draft guidance where it is stated that a charity registered under one purpose is also likely to be undertaking activities that meet another charitable purpose and this may lead to similar misunderstanding. Again, using the example above, a charity may well be providing a public benefit in relation to education as a by-product (through the **activity** of providing education) of its main **purpose** of advancing health. However, if the charity's governing document states one charitable purpose – then that is the purpose that it is set up to advance. It may be able to go about that in a number of different ways – but it is still set up to achieve the purpose as defined in its governing document. It should not be necessary to include the additional charitable purpose, of advancing education, in the governing document. This ties in with comments in relation to public benefit below.

The clarity of what a charity is set up to actually achieve seems to be lacking, and the activities (or how it goes about achieving its purposes) appear to be seen to be determining what a charity is set up to achieve rather than the charity's actual charitable purpose, as set out in its governing document. This may be an issue with the way in which the Act was written, but it does cause confusion. As the Act states that a charity has to have activities which provide public benefit, those activities seem to be mistaken for purposes.

In the TAR it is necessary to give information which should link the charity's achievements and performance with the activities they undertake. Those activities should in turn be linked to the charity's aims and objectives for the year and to how those relate to its charitable objects (or purposes). That can only be done when a charity is clear about what its objects are and what its activities are, how those activities help to meet the objects of the charity and how those activities provide public benefit.

It is clear from the OSCR website pages that some charities are listing multiple charitable purposes even when their governing document may only state one purpose (as shown by the objectives listed: an extract from the charity's governing document). Perhaps it is the application form for charities applying for charitable status which leads to some of the confusion here, as charities may list a number of purposes in Q5: Charitable Purposes, even if these are not actually stated charitable purposes in their governing document.

#### Definitions of Individual Charitable Purposes

##### (b) the advancement of education

Although formal education is included in the full detail section, in the list of activities which might provide public benefit when advancing education, no mention is actually made of the provision of education, training or vocational training. The list provided seems to focus on the activities that could support the provision, rather than any activities that could provide education – such as seminars; conferences; classes for retired, illiterate or innumerate adults.

While it is understood that the lists of activities given in this guidance cannot be exhaustive, the list given here may appear to suggest that the actual provision of learning and educational services does not fall into this charitable purpose.

(c) the advancement of religion

I have considerable concern at the change in the definition of what can and cannot be seen as activities advancing religion.

In the previous version of this guidance the following statement was included:

Where the doctrine of a religious denomination establishes as a religious duty that the poor should be helped or those in need relieved, such activities may also fall under this purpose.

In the draft guidance this has changed to:

Some charities carry out activities that relieve the needs of disadvantaged people, in line with the teachings or duties of their religion. While the religious doctrines involved may guide the way in which such charities carry out these activities, we would regard them as advancing other charitable purposes. For example, the relief of poverty or the relief of those in need, rather than directly advancing religion and we would expect the charity's governing document to state these purposes.

My concerns relate not only to the change as detailed, but also to the fact that this change was not highlighted in any of the guidance or supporting documents sent out in relation to this consultation. This is a significant narrowing of the activities which may be acceptable under this charitable purpose, and as such it should not have been included in the consultation without appropriate information about this change.

The support of those in need, the disadvantaged or those experiencing poverty is more a practical demonstration or outworking of a particular faith, rather than a duty or obligation of that faith, or just something vaguely associated with that faith. Supporting the less fortunate is therefore an integral part of what it means for those religious organisations in the community that they are a part of (be that local, national or international) Social care is generally seen as being implicit for the Christian faith and should therefore be seen as a means of advancing religion.

This also ties in with the comments given previously about which purposes a charity is advancing and how it goes about advancing it. As a means of advancing religion those charities may be doing that by providing social care, community kitchens, pastoral care etc. However their primary purpose remains advancing religion.

In fact, once again the CC guidance differs here from the new draft guidance:

*Whatever way trustees choose to advance religion, it must be clear that the activity is being carried out as an expression of the advancement of that religion.*

*We recognise that, for many, the separation of religious and secular work is not easy, or even possible, as secular and/or social work in these similar fields is in fact an outworking of the religion.*

*However, there is a difference between a religious person undertaking work as part of their religion and a person who has religious beliefs undertaking work in furtherance of a secular purpose. It is important in public benefit terms to be able to distinguish why the activity is being carried out since activities are what organisations do in order to carry out their aims and therefore the activities must be related to those aims.*

*Charities whose aims include advancing religion do not have to undertake secular activities in addition to their religious activities in order to meet the public benefit requirement.*

The document "An Analysis of the Law underpinning The Advancement of Religion for the Public Benefit" goes into English Case law and provides a useful background to the guidance produced by the Charity Commission.

(d) the advancement of health

The information given here about advancing health, public benefit and advancing public participation in sport and how they overlap are quite confusing.

If it is made clear what the charitable purpose is and how that differs from how a charity goes about achieving that purpose, these distinctions become clearer.

Few examples are given about the activities a charity may undertake to fulfil this purpose. This list is much smaller than those given for other purposes, and while it suggests that supporting families of the terminally ill may be an appropriate activity, it does not include supporting families of those with other illnesses or disabilities.

(o) the advancement of animal welfare

The definition of what it means to provide public benefit under this purpose has not really been explained.

In other jurisdictions with the UK it is more clearly stated that for the charitable purpose of advancing animal welfare, the benefit to the animal is actually incidental and the beneficiaries have to be the public (or a section of the public).

**Public Benefit**

The summary statement for Public Benefit on p57, could be made clearer to the extent that the activities that a charity undertakes must be in furtherance of its charitable purpose(s). A charity could be operating outwith its charitable purposes and yet be providing public benefit. The summary statement does not make it clear that this should not happen, and that trustees would be acting outwith their authority when it does happen.

It remains unclear whether a charity is required to provide public benefit for each or all of its charitable purposes, most of the time. While the guidance does state that a charity must actively provide benefit it doesn't state whether this applies to each purpose it may have.

If a charity was required to report public benefit in relation to each of its stated purposes, this may help charities in defining exactly what their purposes are, and how their activities actually achieve those purposes.

# Consultation Response Form

Please help us to analyse the responses to our consultation by completing this form.

Name	<input type="text" value="Scottish Council for Voluntary Organisations"/>
Email address	<input type="text" value="Felix.spittal@scvo.org.uk"/>
Charity number (if responding on behalf of a charity)	<input type="text" value="SC003558"/>

Choose **one** of the categories which best describes you or the organisation you represent.

**Are you responding as a:**

- Charity trustee
- Charity volunteer
- Charity employee
- Professional Adviser
- Member of the public
- Other, please specify:

Do you agree to your response being made available to the public?

- Yes - please answer A below
- No, not at all - your response will be treated as **confidential**

**A.** Where confidentiality is not requested, we will make your response available to the public on the following basis (please tick only one of the boxes):

- Yes, make my response, name and address all available
- Yes, make my response available, but not my name or address
- Yes, make my response and name available, but not my address

# The Charity Test Guidance: content questions and response form

## Section A: Draft Guidance as a whole

**Question 1:** Are you able to find your way around the draft Guidance?

Yes  No

### Comments:

The guidance is generally easy to navigate, both in the PDF and the online version. The introduction of a web specific version is welcome as it is more navigable on mobile devices and provides access to specific information more quickly. However, the buttons used at the bottom of these pages could be clearer, with larger fonts and the navigation direction featured more prominently.

**Question 2:** Overall, is the draft Guidance clear and easy to understand?

Yes  No

### Comments:

The draft guidance is clear and easy to understand, this is largely down to the simple and clear language adopted throughout the document, with explanations given where technical terms are used. The layout and style are also commendable, the use of single fonts, adequate spacing and sensible use of bold make the document accessible and clear.

**Question 3:** Are there any gaps in the draft Guidance? If so, what?

Yes  No

### Comments:

Given the use of case studies throughout the document, it would make sense to have some examples of purposes in the section which sets out how to write a charitable purpose. This is an area where prospective charities often struggle to articulate what they do in the context of charitable purposes, so providing some illustrative examples or links to good practice would be helpful.

**Question 4:** Are the examples used clear and helpful?

Yes  No

Are there any others you think should be included? (please provide details below)

**Comments:**

In most instances the examples are helpful. The case study used to illustrate 'the prevention or relief of poverty' on page 10 could be clearer. In this example the organisation has targeted those in need in need of support by specifying homeless people. However, they have an additional objective to promote citizenship by also inviting others to eat with the homeless people. It is unclear why in this example they would not meet both charitable purposes and why the organisation had to take action to remedy the situation?

**Question 5:** Are the purple links to the explanation of terms helpful?

Yes  No

If you have any suggestions for other terms that need explanation please list them below.

**Comments:**

Linking to the explanation of terms is helpful in some cases. However, with a term such as 'public benefit' where there is a considerably more complete explanation on page 57 of the guidance it would seem sensible to link to the more detailed explanation, rather than the glossary of terms.

It would also help if there are direct links to and from this document to the online applications form. This will allow people to get the answers they need to their questions quickly and easily and should result in better quality applications and reduce the delays caused when OSCR has to return to the prospective charity for additional information.

**Question 6:** Are there any sections of the draft Guidance that you think could be clearer or require more detail?

**Comments:**

While the guidance is undoubtedly clear, people learn and process information in a variety of different ways. It would be beneficial if the guidance contained diagrams or flow charts to illustrate processes where relevant. This would be particularly useful for the way OSCR assesses the charity test as outlined on page 4. Those steps in a flow chart would illustrate the various steps required to meet the charity test.

**Question 7:** If you are familiar with the current [Meeting the Charity Test Guidance](#), which version of the Guidance do you find most helpful and why?

Original Meeting the Charity Test Guidance  Draft Charity Test Guidance

**Comments:**

The new guidance is more accessible in its language and tone and this will make it particularly helpful for charities who wish to understand how the test applies to their own organisation. The old guidance covered the same ground but in a more technical way and seemed to be geared towards advisors and those already familiar with the terms involved.

## Section B: Charitable purposes

**Question 8:** Do you have any comments on the content and/or structure of the charitable purposes section?

Yes  No

**Comments:**

The Scottish Sports Association has raised concerns with us about the definition of ‘the advancement of the public participation in sport’ used in the guidance. Their concern is that the definition on page 33 is not in line with the definition to which the national sports councils adhere to. Sportscotland and the other UK sports councils define sport according to the Council of Europe’s European Sports Charter 1993 definition of sport and based on whether the sport is well established and organised within its jurisdiction.

The European Sports Charter 1993 definition is as follows: ‘Sport means all forms of physical activity which, through casual or organised participation, aim at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels.’

They suggest that it would be inconsistent for OSCR to be defining sport differently to that accepted by the sports councils, the organisations who formally govern sport across the UK. In particular, the reference to ‘physical skill and exertion’ is limiting and excludes various sports depending on perception of the word ‘exertion’. For example, arguably shooting does not involve much exertion but it is a recognised sport which requires physical skill and meets various other requirements listed such as organised activity, competition, opportunities for participation.

We would suggest the OSCR contacts the Scottish Sports Association directly to discuss these concerns in more detail and look at possible solutions.

Voluntary Health Scotland suggested that more clarity would be helpful for Case study 1 on page 18 of the PDF. They suggested that while a lack of evidence for actual treatment should

cause the charity to fail the test, it should be made clear that for a charity involved in developing treatment, the same level of evidence may not be available and that this should not cause them to fail the test.

**Question 9:** Is our explanation of the charitable purposes clear?

Yes  No

**Comments:**

As stated above, it would help to provide some illustrative examples of charitable purposes or links to good practice to assist new charities with writing their purposes.

The charitable purposes section is considerably longer than the previous guidance and the expansion of the definitions is welcome. Structurally we are unsure whether the placement of the 40 or so pages detailing the charitable purposes is the best way of laying out the information in the PDF version of the document. It might be better to list the charitable purposes in the introduction with links to the detail placed at the end of the document. The advantage of this would be to bring forward the important information on public benefit and ensure it is given the correct prominence and is not neglected.

**Question 10:** Does the draft Guidance help you to understand the difference between activities and purposes and how OSCR will consider whether activities relate to a particular purpose?

Yes  No

**Comments:**

Many charities struggle to articulate correctly what their organisation wants to achieve as they feel constrained by the need to refer directly to the defined purposes, so the clear format presented by the table on page 6 is helpful. It would also be beneficial to have a statement in this section to the effect that further definitions of charitable purposes can be found further on in the document, with links to that section of the guidance.



## Section C:

### Public benefit Private benefit Undue restrictions Disbenefit

**Question 11:** Do you have any comments on the content of the above sections in the draft Guidance?

**Question 12:** Do you have any comments on the structure of the above sections in the draft Guidance?

**Question 13:** Do you have any comments on the approach to decision making on the above sections in the draft Guidance?

#### Public benefit comments:

The section on private benefit states: 'Individuals can, do, and should benefit from the activities of charities. However, where individuals, other than members of the public, benefit from an organisation's activities, we will regard this as private benefit.' This sentence is potentially confusing, with the difference between individuals and members of the public not being clear. A link back to the definition of 'public' would help address this issue, especially for those using the web version.

#### Undue restriction comments:

A primary concern with OSCR's application of the charity test is the issue with the charitable status of some fee-paying schools and the interpretation of the 'undue restrictions' test that has been applied. Given that the median proportion of available income spent on means-tested bursaries by fee-paying schools covered in OSCR's recent report was 6.1%<sup>i</sup>, many people will be unconvinced that this can be considered sufficient mitigation of undue restriction.

We welcome OSCR's commitment to maintain a higher vigilance with regard to fee-paying schools but don't agree that the charity test as it stands is working if it allows schools of this type to have charitable status. However, we appreciate that this is a complex issue with implications beyond fee-paying schools. The work of the Scottish Parliament's Public Petitions Committee looking into this area is helpful, but these issues need further consideration.

When taken in conjunction with widely expressed concerns around the charitable status of Arms-Length External Organisations (ALEOs), it is clear that the charity brand is under pressure from organisations taking advantage of loopholes to acquire charitable status.

As it has been 10 years since the introduction of the Charities and Trustee Investment (Scotland) Act 2005, SCVO would like to see the Scottish Government conducting a full review of the Act, to evaluate its effectiveness and to rectify any problems which have emerged since its inception.

## Section E: General

**Question 16:** Do you have any other comments on the draft Guidance?

### Comments:

#### Conclusion

We welcome OSCR's new guidance on meeting the charity test. In general, the document is more accessible and easy to understand for those wishing to set up charities, charity trustees and their advisors. The use of numerous case studies is helpful and this should be extended to the drafting of charitable purposes. An easy-read version of the guidance would be welcome and should be produced for all the main guidance documents designed for trustees as they are updated. The continued charitable status of some fee-paying schools shows that there are clearly still some problems with the charity test which should be rectified in a wide review of the Charities and Trustee Investment (Scotland) Act 2005.

## Equality Impact Assessment (Separate document available on the OSCR [website](#))

**Question 17:** Do you think the draft Guidance will have an impact (positive or negative) on any of the protected characteristic groups listed?

- Age
- Disability
- Gender reassignment

- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

**Comments:**

Given the percentage of those identified in the Equality Impact Assessment as having learning difficulties we would suggest that OSCR produce an easy-read version of the guidance. Boards often have representatives of their service users and they should be provided with the information in a format that is accessible.

**Thank you very much for taking the time to respond.**

**Please email or post your response to us.**

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<sup>i</sup> <http://www.oscr.org.uk/media/1749/2014-12-08-schools-report-final-for-publication.pdf>

# Charity test Guidance consultation

## SCVO response 6 August 2015

### Summary

#### Review of Charity Law

The charitable status of some fee-paying schools shows that there are problems with the charity test, and in particular the application of 'undue benefit'. When taken in conjunction with widely expressed concerns around the charitable status of Arms-Length External Organisations (ALEOs), it is clear that the charity brand is under pressure from organisations taking advantage of loopholes to acquire charitable status.

SCVO would like to see the Scottish Government conducting a full review of the Charities and Trustee Investment (Scotland) Act 2005, to evaluate its effectiveness and to rectify any problems which have emerged since its inception.

#### Draft Guidance

- The new guidance is more accessible than the previous version - the plain language adopted throughout the document makes it clear and easy to understand
- The inclusion of case studies in the guidance is welcome and will enable charities and their advisors to understand the complexities involved with meeting the charity test
- We would like to see the case studies extended to the guidance on charitable purposes - this would assist people in constructing purposes that meet the charity test as well as accurately describing the work of their charity
- Active links between this document and the online charity application form would assist aspiring charities and improve the quality of applications
- It would be beneficial if the guidance contained diagrams or flow charts to illustrate processes such as the various elements which make up the charity test
- The Scottish Sports Association has raised concerns with us about the definition of 'the advancement of the public participation in sport' used in the guidance and in particular the problems associated with the term 'exertion'

## Our response

SCVO welcomes the opportunity to respond to this consultation and would like to contribute to the following questions:

### Section A: Draft Guidance as a whole

**Question 1:** Are you able to find your way around the draft Guidance?

The guidance is generally easy to navigate, both in the PDF and the online version. The introduction of a web specific version is welcome as it is more navigable on mobile devices and provides access to specific information more quickly. However, the buttons used at the bottom of these pages could be clearer, with larger fonts and the navigation direction featured more prominently.

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It would also help if there are direct links to and from this document to the online applications form. This will allow people to get the answers they need to their questions

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**Question 6:** Are there any sections of the draft Guidance that you think could be clearer or require more detail?

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**Question 8:** Do you have any comments on the content and/or structure of the charitable purposes section?

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## **Section C: Public benefit, Private benefit, Undue restrictions, Disbenefit**

**Question 11:** Do you have any comments on the content of the above sections in the draft Guidance?

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**Question 13:** Do you have any comments on the approach to decision making on the above sections in the draft Guidance?

A primary concern with OSCR's application of the charity test is the issue with the charitable status of some fee-paying schools and the interpretation of the 'undue restrictions' test that has been applied. Given that the median proportion of available income spent on means-tested bursaries by fee-paying schools covered in OSCR's recent report was 6.1%<sup>1</sup>, many people will be unconvinced that this can be considered sufficient mitigation of undue restriction.

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We welcome OSCR's commitment to maintain a higher vigilance with regard to fee-paying schools but don't agree that the charity test as it stands is working if it allows schools of this type to have charitable status. However, we appreciate that this is a complex issue with implications beyond fee-paying schools. The work of the Scottish Parliament's Public Petitions Committee looking into this area is helpful, but these issues need further consideration. We would like to see the Scottish Government undertaking a full review of the effectiveness of charitable law.

## **Equality Impact Assessment**

**Question 17:** Do you think the draft Guidance will have an impact (positive or negative) on any of the protected characteristic groups listed?

Given the percentage of those identified in the Equality Impact Assessment as having learning difficulties we would suggest that OSCR produce an easy-read version of the guidance. Boards often have representatives of their service users and they should be provided with the information in a format that is accessible.

## **Conclusion**

We welcome OSCR's new guidance on meeting the charity test. In general, the document is more accessible and easy to understand for those wishing to set up charities, charity trustees and their advisors. The use of numerous case studies is helpful and this should be extended to the drafting of charitable purposes. An easy-read version of the guidance would be welcome and should be produced for all the main guidance documents designed for trustees as they are updated. The continued charitable status of some fee-paying schools shows that there are clearly still some problems with the charity test which should be rectified in a wide review of the Charities and Trustee Investment (Scotland) Act 2005.

### **Contact:**

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Policy Officer

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## About us

The Scottish Council for Voluntary Organisations (SCVO) is the national body representing the third sector. There are over 45,000 voluntary organisations in Scotland involving around 138,000 paid staff and approximately 1.3 million volunteers. The sector manages an income of £4.9 billion.

SCVO works in partnership with the third sector in Scotland to advance our shared values and interests. We have over 1,600 members who range from individuals and grassroots groups, to Scotland-wide organisations and intermediary bodies.

As the only inclusive representative umbrella organisation for the sector SCVO:

- has the largest Scotland-wide membership from the sector – our 1,600 members include charities, community groups, social enterprises and voluntary organisations of all shapes and sizes
- our governance and membership structures are democratic and accountable - with an elected board and policy committee from the sector, we are managed by the sector, for the sector
- brings together organisations and networks connecting across the whole of Scotland

SCVO works to support people to take voluntary action to help themselves and others, and to bring about social change.

Further details about SCVO can be found at [www.scvo.org.uk](http://www.scvo.org.uk).

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<sup>i</sup> <http://www.oscr.org.uk/media/1749/2014-12-08-schools-report-final-for-publication.pdf>

# Consultation Response Form

Please help us to analyse the responses to our consultation by completing this form.

Name	<input type="text" value="Scottish Federation of Housing Associations (SFHA)"/>
Email address	<input type="text" value="astokes@sfha.co.uk"/>
Charity number (if responding on behalf of a charity)	<input type="text" value="N/A"/>

Choose **one** of the categories which best describes you or the organisation you represent.

**Are you responding as a:**

- Charity trustee
- Charity volunteer
- Charity employee
- Professional Adviser
- Member of the public
- Other, please specify:

SFHA is the national representative body for housing associations and co-operatives in Scotland.

Do you agree to your response being made available to the public?

- Yes - please answer A below
- No, not at all - your response will be treated as **confidential**

**A.** Where confidentiality is not requested, we will make your response available to the public on the following basis (please tick only one of the boxes):

- Yes, make my response, name and address all available
- Yes, make my response available, but not my name or address
- Yes, make my response and name available, but not my address

# The Charity Test Guidance: content questions and response form

## Section A: Draft Guidance as a whole

**Question 1:** Are you able to find your way around the draft Guidance?

Yes  No

**Comments:**

The revised layout is helpful and the various links to the different sections and glossary of terms are really useful.

**Question 2:** Overall, is the draft Guidance clear and easy to understand?

Yes  No

**Comments:**

The guidance is more user friendly than the previous version, and this is welcomed.

**Question 3:** Are there any gaps in the draft Guidance? If so, what?

Yes  No

**Comments:**

It would be useful guidance to specific sectors could be developed – although we appreciate that OSCR cover a wide range of organisations and sectors.

**Question 4:** Are the examples used clear and helpful?

Yes  No

Are there any others you think should be included? (please provide details below)

**Comments:**

The examples are extremely helpful, and help to explain each of the Charitable Purposes/Exemptions.

As stated at Question 3, one addition that may be helpful would be to provide sector specific examples – for instance we would find RSL specific examples really helpful. We appreciate that OSCR deals with a wide range of organisations from many different sectors, but wonder if there perhaps would be scope in the future to develop some RSL specific guidance on Meeting the Charity Test jointly with SFHA to further augment this guide?

It might also be helpful to explain a bit more about how OSCR will engage with the charities it regulates. For instance, Case Study 1 on p79 refers to an example whereby an organisation had its charitable status removed. This case it would appear came to the attention of OSCR due to legislative changes and the organisation seeking consent for an amendment to their governing document. Are there other circumstances that would lead to OSCR considering the charitable status of existing charities? Will OSCR look to review existing charities on a cyclical basis, or would it only look to review if it became aware of a significant change, such as the organisation seeking to amend their governing document as in the case study?

One final example that might be helpful would be to include if possible an example of a decision that was successfully appealed (at p7) – if indeed an appeal has been successful. Some statistics on how many applications OSCR has considered over the past year(s); how many decisions are appealed; and how many appeals have been successful might also be a useful addition. As you may be aware, the Scottish Housing Regulator is currently developing an independent appeals process for RSLs in Scotland and will consult upon this later in the year. The process OSCR has in place may be a useful example to draw upon, and we would be keen to know more about how your appeals process works in practice.

**Question 5:** Are the purple links to the explanation of terms helpful?

Yes  No

If you have any suggestions for other terms that need explanation please list them below.

**Comments:**

The links are extremely helpful.

One term that might need a definition is “control” as highlighted at p78 under “ministerial direction.” We have explained this in a bit more depth at question 14 regarding “Exceptions”.

**Question 6:** Are there any sections of the draft Guidance that you think could be clearer or require more detail?

**Comments:**

As highlighted in previous questions, it might be helpful to have separate sector specific guidance where possible.

We have also highlighted a number of additional examples that might be helpful at Question 4.

**Question 7:** If you are familiar with the current [Meeting the Charity Test Guidance](#), which version of the Guidance do you find most helpful and why?

Original Meeting the Charity Test Guidance  Draft Charity Test Guidance

**Comments:**

The revised version is much more user friendly, and the examples provided are a welcome addition.

## Section B: Charitable purposes

**Question 8:** Do you have any comments on the content and/or structure of the charitable purposes section?

Yes  No

**Comments:**

This section is clear, but perhaps specific examples would be helpful under the “Governing Document” section. As you will be aware, the SFHA provides a Model constitution to its members to be adapted for this purpose (the SFHA Charitable Model Rules 2013) and OSCR approved this model and the objects section within. SFHA would be happy for you to site this as an example within this section if that would be helpful.

**Question 9:** Is our explanation of the charitable purposes clear?

Yes  No

**Comments:**

The guidance is clear but as stated at Question 8, it might be helpful to include a specific example real life example or highlight under the “governing documents” section that some sector bodies have Models available for this purpose that have been approved with OSCR.

**Question 10:** Does the draft Guidance help you to understand the difference between activities and purposes and how OSCR will consider whether activities relate to a particular purpose?

Yes  No

**Comments:**

This is clear, although as stated above it may be helpful to include reference that Models are available for this purpose in some sectors that have been approved by OSCR.

**Section C:**

**Public benefit**  
**Private benefit**  
**Undue restrictions**  
**Disbenefit**

**Question 11:** Do you have any comments on the content of the above sections in the draft Guidance?

**Question 12:** Do you have any comments on the structure of the above sections in the draft Guidance?

**Question 13:** Do you have any comments on the approach to decision making on the above sections in the draft Guidance?

**Public benefit comments:**

This is clear, although further examples might be helpful at the conclusion as in the Charitable Purposes section.

**Private benefit comments:**

This is clear, and the case studies help to explain this further.



**Undue restriction comments:**

This is clear and the examples are helpful.

**Disbenefit comments:**

This is clear, and again the examples are helpful.

**Section D: Exceptions (use of assets, ministerial control, party political purposes)**

**Question 14:** Is it clear what the specific exceptions are and what they mean?

**Comments:**

Under “ministerial control” it may be helpful to define “control”, and make it clear that this refers to direct control by ministers over the organisation. The reason we raise this, is that RSLs are subject to the Environmental Information (Scotland) Regulations 2004 because the terms of the legislation state: *“any other person who is neither a public body nor the holder of a public office and who is under the control of a person or body (who is listed in Schedule 1 of the Freedom of Information (Scotland) Act 2002)”* The Scottish Housing Regulator is subject to FOISA, and is considered to have sufficient “control” over RSLs for the regulations to apply to RSLs.

Of course, the “ministerial control” aspect of your guidance would not apply to RSLs in the same

way, because it refers to direct control by ministers, rather than by public bodies - and the Scottish Housing Regulator are independent of Scottish Government. However, it might be helpful to tighten up the definition just to make it clear that regulation would not constitute “ministerial control”.

**Question 15:** If not, how can we clarify these sections?

**Comments:**

As above.

## **Section E: General**

**Question 16:** Do you have any other comments on the draft Guidance?

**Comments:**

As stated previously, the guidance is much clearer than the previous version and the examples are extremely helpful.

**Equality Impact Assessment (Separate document available on the OSCR [website](#))**

**Question 17:** Do you think the draft Guidance will have an impact (positive or negative) on any of the protected characteristic groups listed?

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

**Comments:**

The guidance is much more user friendly than the previous version.

**Thank you very much for taking the time to respond.**

**Please email or post your response to us.**

# Consultation Response Form

Please help us to analyse the responses to our consultation by completing this form.

Name

Email address

Charity number (if responding on behalf of a charity)

Choose **one** of the categories which best describes you or the organisation you represent.

**Are you responding as a:**

- Charity trustee
- Charity volunteer
- Charity employee
- Professional Adviser
- Member of the public
- Other, please specify: Umbrella group for charities.

Do you agree to your response being made available to the public?

- Yes - please answer A below
- No, not at all - your response will be treated as **confidential**

**A.** Where confidentiality is not requested, we will make your response available to the public on the following basis (please tick only one of the boxes):

- Yes, make my response, name and address all available
- Yes, make my response available, but not my name or address
- Yes, make my response and name available, but not my address

# The Charity Test Guidance: content questions and response form

## Section A: Draft Guidance as a whole

**Question 1:** Are you able to find your way around the draft Guidance?

Yes  No

### Comments:

The draft Guidance is an improvement on previous Guidance and the use of links is helpful. However, information which appear under one charitable purpose may be relevant to more than one purpose. This is a risk as the user may only read the section they consider relevant to their application.

**Question 2:** Overall, is the draft Guidance clear and easy to understand?

Yes  No

### Comments:

It appears that the directed audience of the Guidance is the general public rather than professionals as the legal principles which lie behind the Guidance are not discussed.

**Question 3:** Are there any gaps in the draft Guidance? If so, what?

Yes  No

### Comments:

As tax relief for Scottish charities continues to be based on English charitable purposes it would useful to mention this. Could examples be given where HMRC has not accepted a Scottish charity as a charity for tax purposes?

**Question 4:** Are the examples used clear and helpful?

Yes  No

Are there any others you think should be included? (please provide details below)

**Comments:**

For obvious reasons the Scottish Churches Committee deliberations have focussed on the Guidance for “*advancement of religion*”.

The work undertaken by Churches and religious organisations is wide and varied but all this work is undertaken in the “name of religion”. As highlighted in the St Margaret’s adoption case, advancing religion goes way beyond the provision of public worship. For example, many congregations of different denominations hold ‘Poor or Benevolent Funds’ which are used for the relief of poverty within the area in which the congregation undertakes its work. These funds are ingathered and distributed as part of the congregation’s work to “advance religion”. Although there is another charitable purpose for “the relief of poverty or relief of those in need” the Scottish Churches Committee is firmly of the view that the distribution of ‘Poor or Benevolent Funds’ by congregations and other Church bodies is only done in the “advancement of religion”. Similarly are the many projects carried out by denominations both at national, regional and congregational level to help those in financial or other need including the running of lunch clubs for pensioners, food banks, groups supporting recovering alcoholics and drug addicts. Although the guidance mentions “outreach” it suggests – the Committee would argue incorrectly – that such work requires to be classed as falling within another charitable purpose which has to be specified in the governing document. The Committee is firmly of view that the particular church charity’s governing document does not need to specify it can relieve poverty or those in need. Churches can, of course, direct OSCR to various passages in the Bible which underpin the work which churches do by way of mission and outreach to the poor and disadvantaged in society such as for example Matthew 25 verses 37-40 (which was a passage quoted in the St Margaret’s case).

The same rationale would operate for other charitable purposes, e.g., advancement of education; the advancement of health; the advancement of arts, heritage, culture or science; the advancement of human rights, conflict resolution or reconciliation and the promotion of religious or racial harmony. This is not an exhaustive list but these are all areas the Churches in Scotland work in and promote but all do so to “advance religion”. The Committee therefore considers that the guidance should reflect this wider meaning of the advancement of religion.

A large percentage of the charities on the Register have the “advancement of religion” as their only or one of their charitable purposes. The Committee therefore finds it surprising there are no case studies given for this charitable purpose.

**Question 5:** Are the purple links to the explanation of terms helpful?

Yes  No

If you have any suggestions for other terms that need explanation please list them below.

**Comments:**

**Question 6:** Are there any sections of the draft Guidance that you think could be clearer or require more detail?

**Comments:**

As previously mentioned case studies for Advancement of Religion would be welcomed.

**Question 7:** If you are familiar with the current [Meeting the Charity Test Guidance](#), which version of the Guidance do you find most helpful and why?

Original Meeting the Charity Test Guidance  Draft Charity Test Guidance

**Comments:**

## Section B: Charitable purposes

**Question 8:** Do you have any comments on the content and/or structure of the charitable purposes section?

Yes  No

**Comments:**

Many charities purposes come under more than one charitable purpose which is not reflected in the guidance.

**Question 9:** Is our explanation of the charitable purposes clear?

Yes  No

**Comments:**

**Question 10:** Does the draft Guidance help you to understand the difference between activities and purposes and how OSCR will consider whether activities relate to a particular purpose?

Yes  No

**Comments:**

**Section C:**

**Public benefit**  
**Private benefit**



## **Undue restrictions Disbenefit**

**Question 11:** Do you have any comments on the content of the above sections in the draft Guidance?

**Question 12:** Do you have any comments on the structure of the above sections in the draft Guidance?

**Question 13:** Do you have any comments on the approach to decision making on the above sections in the draft Guidance?

**Public benefit comments:**

**Private benefit comments:**

**Undue restriction comments:**

**Disbenefit comments:**

**Section D: Exceptions (use of assets, ministerial control, party political purposes)**

**Question 14:** Is it clear what the specific exceptions are and what they mean?

**Comments:**

**Question 15:** If not, how can we clarify these sections?

**Comments:**

## **Section E: General**

**Question 16:** Do you have any other comments on the draft Guidance?

**Comments:**

**Equality Impact Assessment (Separate document available on the [OSCR website](#))**

**Question 17:** Do you think the draft Guidance will have an impact (positive or negative) on any of the protected characteristic groups listed?

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

**Comments:**

**Thank you very much for taking the time to respond.**

**Please email or post your response to us.**

# Consultation Response Form

Please help us to analyse the responses to our consultation by completing this form.

Name	<input type="text" value="Charity Law Sub-committee, Law Society of Scotland"/>
Email address	<input type="text" value="katiehay@lawscot.org.uk"/>
Charity number (if responding on behalf of a charity)	<input type="text" value="n/a"/>

Choose **one** of the categories which best describes you or the organisation you represent.

**Are you responding as a:**

- Charity trustee
- Charity volunteer
- Charity employee
- Professional Adviser
- Member of the public
- Other, please specify: **Professional body**

Do you agree to your response being made available to the public?

- Yes - please answer A below
- No, not at all - your response will be treated as **confidential**

**A.** Where confidentiality is not requested, we will make your response available to the public on the following basis (please tick only one of the boxes):

- Yes, make my response, name and address all available
- Yes, make my response available, but not my name or address
- Yes, make my response and name available, but not my address

# The Charity Test Guidance: content questions and response form

## Section A: Draft Guidance as a whole

**Question 1:** Are you able to find your way around the draft Guidance?

Yes  No

### Comments:

The way in which the material is structured (and including the use of links etc) will facilitate navigability for most users – but in certain cases it will be less helpful. In particular:

- some of the commentary which appears under a particular charitable purpose (particularly on the public benefit test) could be relevant in relation to other charitable purposes – so there is a risk that people looking only at the comments on charitable purposes that are directly relevant to their organisation will miss that additional guidance;
- the guidance does not currently address the position of charities that are set up to provide funding for a range of charitable purposes (ie grant-giving charities), and some commentary on that would be helpful;
- most charities have two or more charitable purposes, and strands of activity that are referred to in the guidance as falling outwith the boundaries of what can be said to be in furtherance of a particular charitable purpose might be legitimate in furtherance of a different charitable purpose; it might be helpful, therefore, to cross-refer to other charitable purposes which may be relevant in the context of a particular activity.

**Question 2:** Overall, is the draft Guidance clear and easy to understand?

Yes  No

### Comments:

Yes, we feel that the way in which the guidance is structured (subject to the reservations expressed above), the language which is used, the focus on practical implementation and approach, and the use of case studies, all contribute to guidance which will be clear and easy to understand for the intended audience. Having said that - and recognising, of course, that it is impossible to meet the needs of every user, and that the focus has to be on the requirements of the majority of users – the absence of any reference to the underlying legal principles means that the guidance may be of limited benefit to those (particularly lawyers)

who are wanting to break new ground or challenge OSCR's established position in relation to certain matters. We would suggest that there should at least be some reference (even in general terms) to the fact that there does exist a body of case law which guides OSCR's approach.

**Question 3:** Are there any gaps in the draft Guidance? If so, what?

Yes  No

**Comments:**

As noted above, some commentary on the position of grant-giving charities would be helpful. Perhaps more importantly, there should be some reference to the fact that HMRC Charities must have regard to the charity law of England & Wales (not Scotland), and perhaps with a few examples of where divergences might occur.

**Question 4:** Are the examples used clear and helpful?

Yes  No

Are there any others you think should be included? (please provide details below)

**Comments:**

The examples are indeed clear and helpful, but we have a number of reservations in relation to certain of the case studies:

- *relief/prevention of poverty:* Case Study 1 seems to us to adopt too narrow a perspective. It is by no means clear that providing free meals to people from the local community who were not in poverty, on the basis that they would be sitting down to eat with homeless people, would not have a significant impact in tackling stigma and increasing acceptance of homeless people within the community, as well as improving the homeless people's skills and self-confidence through that interaction at a personal level.....and thus very much to the benefit of homeless people. While we appreciate that the inclusion of this case study may well have been based on the desire to reinforce the principle that help must be targeted closely on those who are in need, it is questionable whether this particular example should have been used.
- *advancement of education:* Case Study 1 seemed to be at best borderline, in rejecting a

project which (on the basis of the limited information given in the scenario) was very much in line with the usual features of many educational initiatives delivered in a community setting. There is a risk that those using the guidance would misunderstand the underlying message, and take the view that only formal education, delivered by professionally qualified teaching staff, would be accepted as advancing education in a charity sense. This is one example (there are others within the draft Guidance) where the detail of activities and the case studies appear to drill down into qualitative matters. We would query whether some established charities (for example the Rudolph Steiner Schools), would achieve charitable status under the approach suggested in the Guidance, if they were required to provide, in advance, evidence of educational benefits from a particular approach. It would be disappointing if the commentary in Case Study 1 resulted in people being put off pursuing charitable status, where there was a passionate and dedicated group of people behind an idea that would further education. A further point in relation to Case Study 1 is that the purposes of the organisation might be better expressed as involving both community development/citizenship and education.

- *advancement of religion*: We would query the suggestion that the work of many religious organisations in eg tackling issues of poverty through food banks etc, would need to be reflected in the inclusion of specific charitable purposes (over and above advancement of religion) within its constitution. By way of example, Church of Scotland would no doubt say that it furthers most heads of charity, including religion. However, it does not refer to other charitable purposes within its "governing document". It might also be argued that the position taken by OSCR in the guidance is in conflict with the principles established in the St Margaret's case.

As regards the commentary on closed orders, we would suggest that before a closed order could be regarded as not furthering a charitable purpose, it would require to be closed for reasons not related to a connected belief. We would suggest that HMRC's approach to closed orders/religious charities might usefully inform the commentary in this section of the guidance.

- *advancement of health*: In relation to Case Study 1, the suggestion that public benefit is in certain instances tested through online research by OSCR raises the question of whether that is a sufficiently rigorous approach – particularly on matters such as the efficacy of treatment where there may be scope for disagreement among leading research scientists. Also, it is noted that a case study appearing later in the Guidance refers to charitable status being given to an organisation set up to investigate innovative forms of third sector funding; in that latter case, there did not seem to be any investigation of the question of whether or not those investigations had any real



prospect of success.

- *saving of lives*: We would suggest that it might be useful to make reference to police and fire services charities in this context.
- *advancement of citizenship or community development*: On a point of detail, the fifth bullet under the heading of “which activities might provide public benefit when advancing this purpose”, appears to rule out entirely any work to shop-fronts or commercial buildings – whereas we would have thought that, providing the public benefit (in terms of improvement to streetscape and/or conservation of listed buildings) greatly outweighed any benefit to the commercial owners/occupiers of the premises, this type of activity could be legitimate from a charity law point of view.
- *advancement of the arts, heritage, culture or science*: In respect of the advancement of heritage we note the reference to “a country’s” heritage. It is not applied to the other aspects of this heading and we would question whether this reference should be removed as it is no more relevant to heritage than it is to the arts or culture.

We have a concern that in relation to heritage assets, the document might read as limiting charitable status to organisations dealing with “monuments” - whereas that not ought to be the case. Care is required in referring to “listed” buildings in this context, to avoid any implication that “advancement of heritage” can only apply in relation to listed buildings. Also, the category of “heritage” for this purpose could include assets that were not buildings or other structures, and this should perhaps be clarified. We note that there are no case studies set out against this particular charitable purpose – and one or two examples might be helpful.

We note that the advancement of culture is viewed from the perspective of the features or characteristics of society or a segment of society. Accordingly, it is not just an adjunct of “the arts” as some might think. This would seem in many ways to be correct, but it may be that many charities and prospective charities consider themselves to be “cultural” organisations due to their artistic work, without reference to the characteristics of society etc. It would perhaps aid clarity if either it was clarified that many “cultural” organisations are in fact “arts” organisations, or if the examples of the advancement of culture were expanded to include charities which form part of what might be described as the “arts and culture sector.”

- *advancement of environmental protection or improvement*: It might be helpful for the guidance to go into more detail around the extent to which charities can be involved in

renewables under this heading, given the interest and activity in this area at present. A case study might be helpful here. As regards the bullets appearing beneath the heading "What do we mean by environmental protection or improvement?" on page 46, we would suggest that where there is reference to "the investigation of climate change" it might be useful to add there "or mitigation" after "investigation".

- *the relief of those in need by reason of age, ill health, disability, financial hardship or other disadvantage*: The explanations here might benefit from further elaboration on the interface with the Equalities Act. In particular, it might be useful to draw out the relationship between protected characteristics and the headings under this charitable purpose.
- *the advancement of animal welfare*: This is one charitable purpose where there is "no public" (for the "public benefit test"), or at least no public receiving a direct benefit, given that there is no human interface; and that point might perhaps be noted in the guidance. Again, the case law relevant to charitable status for HMRC purposes might be of assistance here, as identifying an indirect benefit to the human public emanating from the humane treatment of animals by human beings.

**Question 5:** Are the purple links to the explanation of terms helpful?

Yes  No

If you have any suggestions for other terms that need explanation please list them below.

**Comments:**

**Question 6:** Are there any sections of the draft Guidance that you think could be clearer or require more detail?

**Comments:**

The suggestions which are made in the Guidance regarding the drafting of charitable purposes could be misleading to certain users – and in particular we have reservations about the potential risk of adopting too narrow a form of words, with insufficient flexibility to accommodate future developments at the level of activities rather than aims.

**Question 7:** If you are familiar with the current [Meeting the Charity Test Guidance](#), which version of the Guidance do you find most helpful and why?

Original Meeting the Charity Test Guidance  Draft Charity Test Guidance

**Comments:**

The draft Charity Test Guidance represents in our view a significant improvement on the original Meeting the Charity Test Guidance.

## Section B: Charitable purposes

**Question 8:** Do you have any comments on the content and/or structure of the charitable purposes section?

Yes  No

**Comments:**

See detailed comments in response to Question 4

**Question 9:** Is our explanation of the charitable purposes clear?

Yes  No

**Comments:**

See detailed comments in response to Question 4

**Question 10:** Does the draft Guidance help you to understand the difference between activities and purposes and how OSCR will consider whether activities relate to a particular purpose?

Yes  No

**Comments:**

We would expect that the draft Guidance will indeed aid the users' understanding in relation to

both elements outlined above.

## **Section C:**

### **Public benefit Private benefit Undue restrictions Disbenefit**

**Question 11:** Do you have any comments on the content of the above sections in the draft Guidance?

**Question 12:** Do you have any comments on the structure of the above sections in the draft Guidance?

**Question 13:** Do you have any comments on the approach to decision making on the above sections in the draft Guidance?

#### **Public benefit comments:**

The existing guidance covering "anticipatory" benefits/charities has fuller detail, and it might be helpful to include more of that material.

In relation to trustee remuneration (page 63), it is not clear why OSCR should go beyond the charity test in exploring (at set-up of the charity) trustee remuneration - beyond the specific requirements of the legislation regarding trustee remuneration.

As regards the comments in the second last paragraph on page 70 in relation to "single employers", this might run contrary to the focus of a number of existing charities (for example, where the beneficiaries are those employed by large monopoly employers).

#### **Private benefit comments:**

See comments above.

#### **Undue restriction comments:**

See comments above.

**Disbenefit comments:**

## **Section D: Exceptions (use of assets, ministerial control, party political purposes)**

**Question 14:** Is it clear what the specific exceptions are and what they mean?

**Comments:**

**Question 15:** If not, how can we clarify these sections?

**Comments:**

## **Section E: General**

**Question 16:** Do you have any other comments on the draft Guidance?

**Comments:**

We would suggest that it would be helpful for the draft Guidance to be referred to HMRC Charities to ensure that they are satisfied that the boundaries round each charitable purpose suggested in the Guidance are in line with the approach which they would adopt in determining what was or was not in furtherance of a charitable purpose for tax purposes – and with an appropriate statement confirming HMRC’s position being included within the final text of the Guidance.

We would suggest that the draft Guidance be referred to the Charity Commission as well, to ensure that the guidance does not contradict any aspect of their guidance for cross-border charities. Also in relation to cross-border charities, we would suggest that there could be a more substantial entry in the body of the guidance than simply a link to OSCR's cross border constitution guidance note (perhaps extracted and adapted from the link provided).

**Equality Impact Assessment (Separate document available on the [OSCR website](#))**

**Question 17:** Do you think the draft Guidance will have an impact (positive or negative) on any of the protected characteristic groups listed?

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

**Comments:**

**Thank you very much for taking the time to respond.**

**Please email or post your response to us.**

# Consultation Response Form

Please help us to analyse the responses to our consultation by completing this form.

Name	<input type="text" value="Turcan Connell"/>
Email address	<input type="text"/>
Charity number (if responding on behalf of a charity)	<input type="text"/>

Choose **one** of the categories which best describes you or the organisation you represent.

**Are you responding as a:**

- Charity trustee
- Charity volunteer
- Charity employee
- Professional Adviser
- Member of the public
- Other, please specify:

Do you agree to your response being made available to the public?

- Yes - please answer A below
- No, not at all - your response will be treated as **confidential**

**A.** Where confidentiality is not requested, we will make your response available to the public on the following basis (please tick only one of the boxes):

- Yes, make my response, name and address all available
- Yes, make my response available, but not my name or address
- Yes, make my response and name available, but not my address



# TURCAN CONNELL

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## **A CONSULTATION ON THE OFFICE OF THE SCOTTISH CHARITY REGULATOR CHARITY TEST GUIDANCE**

### **CONSULTATION RESPONSE by TURCAN CONNELL'S CHARITIES TEAM**

We are pleased to present our Charities Team's response to the Office of the Scottish Charity Regulator's ("OSCR") consultation on its proposed revised and updated guidance on the Charity Test.

#### *General Comments on draft guidance as a whole*

The guidance is undoubtedly an improvement and development on the existing guidance. The emphasis on creating a 'user-friendly' document is obvious and for the most part works well. We would agree that the new guidance is more informal, clear and easy to understand and is more helpful than the existing guidance. Before discussing the separate sections of the guidance, we would make the following general comments:

The addition of case study examples and emphasis on practical matters makes the guidance more accessible. The case studies are useful and provide much needed context to the description of the charitable purposes. This change, which is arguably the most useful improvement, would be enhanced if a standard construction was adopted for the case studies. For example, each charitable purpose could have an example of each where the application was granted, refused, and where OSCR had initial queries and subsequently approved the application. This would provide a more complete picture of each charitable purpose and ensure the guidance was consistent. As a minimum, each charitable purpose should have a successful and unsuccessful case study. One step further would be to provide a case study for each main element of each of the charitable purposes.

While we appreciate that OSCR may wish to restrict the length of the guidance document, it is unlikely that every reader will review it cover to cover every time it is used for reference. The fact that the document is split into sections means that the reader can refer to the relevant part with ease. The benefit of extending the document to include more detailed case studies would outweigh any potential detriment of producing a longer document.

Where OSCR have found that there is a common and recurring misunderstanding in relation to one or more of the charitable purposes or public/private benefit, providing further explanation or case studies would be particularly helpful.

Some of the charitable purpose sections are noticeably shorter than others. We suspect that this may be due to a small number of applications for charities advancing those purposes. In such cases, theoretical case studies and general guidance would be helpful.

Throughout the guidance, OSCR explains that its role is to determine and assess whether the proposed activities of the charity further the charitable purpose(s) and are for public benefit. Where possible, the criteria used and/or the methods and measures implemented need to be clear, transparent and fully explained.

Although it is mentioned that the charitable purposes can be advanced in 'Scotland or elsewhere', the guidance has a strong Scottish theme running through it. Greater emphasis should be given in the introduction and some of the suggested activities and case studies to UK/international examples.

It is anticipated that the guidance will be used both in electronic and paper formats. The inclusion of links within the document when used in pdf format is convenient to move between sections with ease. It is unclear whether the guidance will be available on the OSCR website to open or download as a pdf only, or whether there will be interactive pages on the website. We would draw comparisons with guidance produced by both the Charity Commission and Charity Commission NI.

The legal basis and statutory references from the existing guidance has not been carried over as part of the revision. While it is arguable that the guidance needs to be easy to understand, omission of references to relevant sections of the Charities and Trustee Investment (Scotland) Act 2005 ("2005 Act") does not necessary make it more comprehensible. The charity test loses some of its 'statutory weight' if the references to the sections in the 2005 Act have been removed. The reader should understand and be aware of the legal basis behind the charity test.

A number of the sections contain 'Other information' sections. We believe the reader would benefit if OSCR explained why this information may be useful/relevant.

Generally, the guidance is more tailored towards new applicants, rather than existing charities. Perhaps OSCR would consider emphasising the continuing obligation to meet the charity test.

We would make a small comment on the use of blue and purple bold print to highlight key phrases and links to the glossary. These colours are relatively similar and it will have more of an effect if opposing colours were used to differentiate the bold print. Highlighting these

words is a good idea, however if the different colours are not easily distinguishable, it is a wasted exercise.

### *Introduction*

The existing guidance refers to a charity's 'constitution', whereas the revised guidance refers to 'governing document'. The 2005 Act uses the term 'constitution. Although this is not a material point, the use of 'constitution' is consistent with the 2005 Act and general practice.

The paragraph at the top of page 6 may be considered a disincentive to charities having more than one charitable purpose. Discouraging wider purposes is not a helpful approach. We suggest that the guidance explains that further information/more evidence is required if the applicant wishes to have more than one charitable purpose.

The practical guidance on page 6 on drafting charitable purposes is a welcome addition. We would suggest that readers would benefit from further guidance on drafting the purposes so as to provide some level of 'future-proofing' or sufficient width of anticipated/intended purposes. This would allow for a small amount of evolution of activities within the charity which still furthers its charitable purposes.

The existing guidance goes into some detail about OSCR discussing and liaising with the applicant to help restructure their proposed purposes if they do not meet the test in the first instance and when reviewing existing charities, providing directions etc. The new guidance does not highlight any such dialogue with OSCR. From our previous experience of OSCR seeking further information on an application and asking additional questions, it would be helpful if OSCR's concerns and the general line of questioning were specific and expressed at the outset. If OSCR is not explicit with its underlying concern, this makes it difficult for the applicant to provide full answers and alleviate such concerns. A known, understood and clear line of questioning would be helpful and may prevent long, protracted delays. Clear guidance on OSCR's approach to this part of the implementation of meeting the charity test would be welcomed.

### *Charitable Purposes*

In our opinion, the content and structure of these sections have been improved. The explanations have been extended and the lists of proposed activities which might further the purposes are practical indicators. However, it should be expressed clearly that the lists are not exhaustive so as not to restrict the application of the charitable purposes/activity in question.

(a) The prevention or relief of poverty

In this section, where proposed activities are discussed, it would seem logical to refer to the prevention of poverty before the relief of poverty as this would follow the wording of the 2005 Act.

(b) The advancement of education

It would be helpful if the phrase 'educational value or merit' in this section was further explained, particularly as it is a key phrase. Also, detail on how OSCR determines whether something is of educational value or merit should be provided to ensure better understanding and transparency on OSCR's part.

We believe the fourth paragraph on page 12 requires further consideration. While we understand the general purpose behind the statement, OSCR needs to be careful it is not unnecessarily narrowing the scope of the purpose; for example, how would OSCR assess research papers?

In case study 2, would the lack of an established relationship with the schools have prevented the application from being successful? Many organisations have 'intended' activities rather than established activities at the point they seek registration.

(c) The advancement of religion

We do not agree with OSCR's analysis on page 16 regarding its expectation that activities advancing other charitable purposes should be specified in a religious charity's governing document. We would argue that this does not reflect general practice or the current understanding of current religious charities.

(d) The advancement of health

We would question on what basis OSCR are deciding if a proposal is advancing health. Can OSCR assess the relative success of a proposed activity, particularly if it is research-based? It is likely that some of the organisation seeking to carry out activities under this purpose will be undertaking medical research. Later in the guidance in relation to non-conventional methods, OSCR states that it will require such methods to be independently verified as effective. Similarly in case study 1, OSCR researched the matter online; separately we would question whether this is an appropriate assessment by OSCR and a valid method of assessing proposed activities. What about new and innovative methods and treatments? Considering the depth of knowledge required in this area, is OSCR suitably qualified to take such decisions? How does OSCR judge the veracity and accuracy of the recourses it has researched?

(f) The advancement of citizenship or community development

The additional detail in this section is useful as applications under this purpose have been a source of difficulty in our previous experience. The difference between community development and providing recreational activities is often blurred and misunderstood, particularly since ‘providing, maintaining and improving recreational facilities’ is given as an example of an activity which may provide public benefit under rural /urban regeneration. We would suggest that the definition of ‘rural or urban regeneration’ be re-considered. We would question whether it is appropriate to narrow the purpose to reversing decline only where there is evidence of deprivation. We would argue that the existence of poverty is not an absolute requirement for regeneration.

Also, if there is to be a specific ‘need’ to be addressed, what type of evidence would satisfy OSCR, as our experience has shown a degree of difficulty with this purpose.

In the list of activities which might provide public benefit on page 25, it would be helpful if OSCR can elaborate why ‘work to shop fronts or commercial buildings’ would not be advancing this purpose.

(g) The advancement of the arts, heritage, culture or science

It would be helpful if OSCR would expand on how it measures whether a piece of art is/will provide public benefit; how it measures its value to the public? Does OSCR seek the advice of an expert?

(i) The provision of recreational facilities

On page 38, the grounds under which no one should be excluded are listed and sexual orientation has been omitted.

With regard to ‘meeting a social need’, again does OSCR require external/independent evidence of this need and what type of evidence would be satisfactory?

(j) The advancement of human rights

It would be helpful if OSCR expanded on the meaning of ‘State’ and ‘restorative justice’.

When describing the scale of conflicts on page 41, we believe it would be more accurate to state that the purpose includes the resolution of conflicts on a ‘local, national or international level’.

(p) Any other purpose that may reasonably be regarded as analogous

As armed forces charities are increasing in number, it would be helpful if OSCR extended the statement on page 56 to provide a more detailed example. The three examples of

charities with analogous purposes are commonly known examples and also the same examples used in the current guidance. Different examples would be welcomed.

*Public Benefit, Private Benefit, Undue Restrictions and Disbenefit & exceptions*

As with the other sections, the guidance has been improved with further, practical details, and the interaction between the four concepts is better illustrated.

With regard to trustee remuneration, we would question why such emphasis is required and note that it is our experience that OSCR ask a disproportionate number of questions on this point when considering an application. The rule under s67 of the 2005 Act is clear and trustees/charities are obliged to comply. We would argue that compliance with the test is all that is required here.

The existing guidance refers to external comparators and this has been omitted from the new guidance. In the guidance, OSCR refers the reader to external information and admits to assessing applications by carrying out independent online research. We believe OSCR needs to fully consider this point and comment further on external influences.

In case study 2 on unnecessary private benefit, the method of measurement OSCR uses is 'best value'. This suggests that trustees should consider the cost of a service (for example) as a determining factor and takes no account for quality, best interests of the charity etc. We would argue whether in determining 'best value', OSCR makes it clear that other factors in addition to cost should be considered.

**Turcan Connell**  
**29<sup>th</sup> May 2015**