



Meeting the Charity Test Guidance: Consultation Report

August 2015
Scottish Charity Regulator

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1. Introduction

This report summarises the results from our recent consultation on our new Meeting the Charity Test Guidance.

It has been nearly seven years since the Scottish Charity Regulator (OSCR) last updated its Guidance on how to meet the charity test¹. Since then, OSCR has granted charity status to nearly 10,000 charities and conducted a number of reviews of existing charities' ability to meet the charity test.

The aim of the revised Guidance is to make it as easy as possible for advisors, applicants and charity trustees to understand the charity test. While the charity test itself has not changed, our experience has allowed us to develop new and clearer ways of illustrating the charity test. This will also be the first piece of Guidance designed, in the first instance, for the web. It is part of an overall shift in our approach to producing and sharing Guidance.

The consultation put two main questions:

- 1. How easy is the Guidance to understand and use?**
- 2. Is the content of the Guidance appropriate? What might be missing and what might be improved?**

The report will look at the main results of the consultation, taking each of the two questions in turn. We have analysed the quantitative and qualitative information received.

¹ Section 7 of The Charities and Trustee Investment (Scotland) Act 2005 ('the 2005 Act')

(1) A body meets the charity test if –

(a) its purposes consist only of one or more of the charitable purposes, and

(b) it provides (or, in the case of an applicant, provides or intends to provide) public benefit in Scotland or elsewhere.

2. The Consultation process

The consultation ran from 3 March to 26 May 2015. We received 52 responses to our online questionnaire and 31 written responses to our detailed questions, while over 90 people participated in one of the stakeholder events.

OSCR would like to thank everyone that responded to the consultation and attended one of the meetings or events.

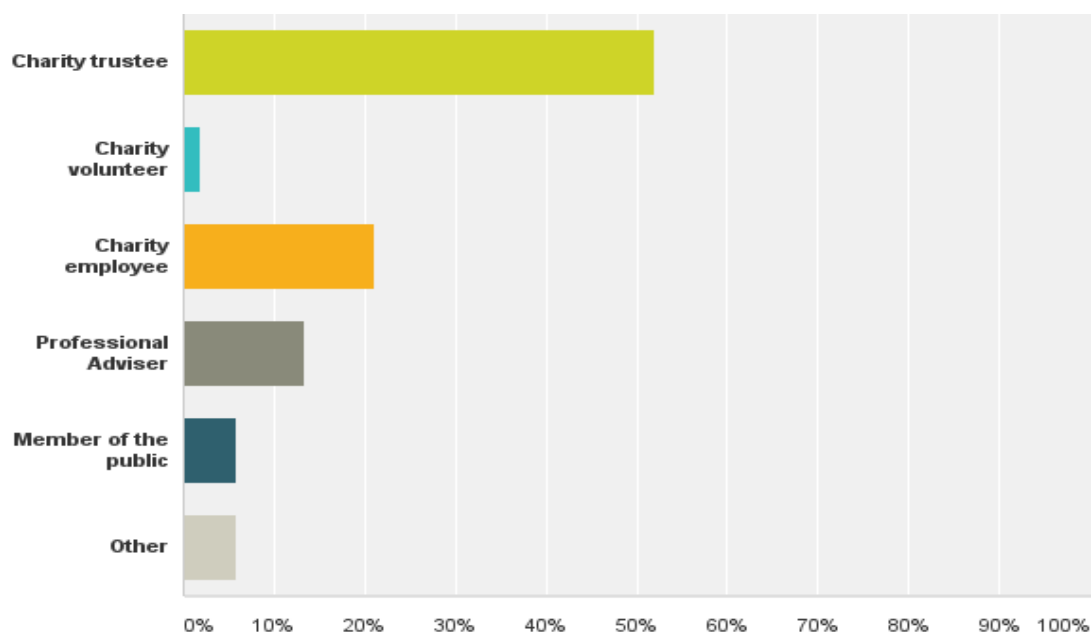
There were three main ways of engaging with the consultation.

1. Online

There were two strands to the online consultation.

- Strand 1: Completing a short online questionnaire.
- Strand 2: Emailing a written response to OSCR.

The Strand 1 questionnaire was designed to take a few minutes to complete. It focused on how easy the draft Guidance was to navigate and understand. There were 52 responses to the online survey. Over 50% (27 respondents) were charity trustees; 21% (11) respondents were charity employees; 13% (7) were professional advisers.



The strand 2 response form asked more detailed questions about the content of the draft Guidance. The majority of respondents (67%) were from Third Sector Interfaces (TSIs).

2. Participating in one of three stakeholder events around Scotland

We held three events with TSIs and advisory bodies (in Edinburgh, Glasgow and Inverness). In total over 90 participants attended.

The methodology allowed the participants to move from small discussion groups to a final plenary session. Prior engagement with participants through an online survey aimed to identify priority areas of the Guidance for focused discussion.

3. Meeting with OSCR representatives at one of three bilateral meetings.

We ran three bilateral meetings as part of the consultation process to discuss details of the Guidance with key stakeholders representing specific areas of the sector. These were with the Development Trust Association (Scotland) (DTAS); the Charity Law Sub-committee of the Law Society of Scotland and the Governance Forum.

3. The main findings

3.1 How easy is the Guidance to understand and use?

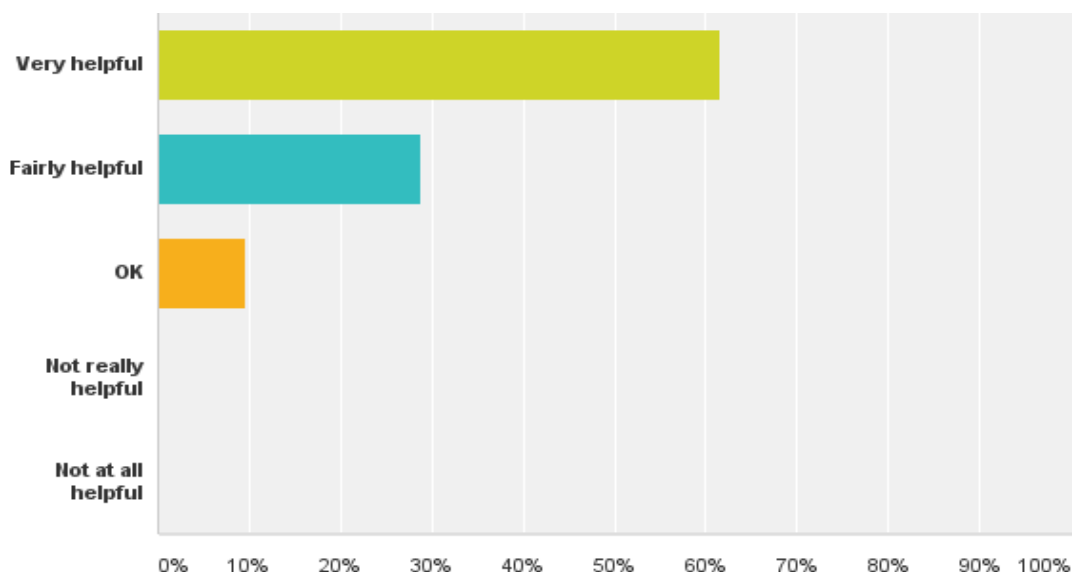
There was an overwhelmingly positive response in the Strand 1 questionnaire with respect to the usability of the Guidance. Of the 52 respondents, over 81% (42) felt that the draft Guidance was very easy, or extremely easy, to navigate, with the other 19% (10) stating that they felt it was “ok”.

81% navigation extremely easy or very easy



This was also reflected in the response to the question about the layout of the Guidance, with 61% (32) stating that they felt that the layout was “very helpful” a

further 29% (15) stating that it was “fairly helpful” and the final 10% (5) feeling that it was “ok”.



Overall, 98% (50) of respondents felt that the different sections contained in the Guidance were useful, and 100% felt that the links in the Guidance to an explanation of specific terms was useful. Only 8% (4) felt that it would be necessary to explain any other terms.

This trend is replicated in the Strand 2 responses to the yes/no questions that formed part of the detailed responses:

Strand 2 Questions	Yes	No	Not answered
Are you able to find your way around the draft Guidance?	26 (84%)	0	5 (16%)
Overall, is the draft Guidance clear and easy to understand?	26 (84%)	0	5 (16%)
Are there any gaps in the draft Guidance?	10 (32%)	10 (32%)	11 (36%)
Are the examples used clear and helpful?	24 (78%)	2 (6%)	5 (16%)
Are the purple links to the explanation of terms helpful?	22 (71%)	1 (3%)	8 (26%)

The longer written responses highlighted a general belief that the Guidance was very usable. 74% of Strand 2 respondents used phrases in their unprompted answers that underlined their approval of the structure and format of the Guidance, with many of these respondents using the word “excellent” to describe it.

A respondent stated:

“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.”

In the stakeholder meetings and events there was an overwhelmingly positive response to the structure and format of the Guidance. In all cases, people felt that it was an improvement over the former Guidance, and that it resulted in a document that would make it easier for people to read, understand and comply.

There were some detailed recommendations aimed at increasing the usability of the Guidance. These included:

- making sure that links to the glossary worked in both directions
- looking at the order of items (for instance, were Public Benefit, Private Benefit and Disbenefit in the right places) and
- making sure the downloadable version was easy to use, including the inclusion of page numbers and an index.

There was some suggestion that the Guidance was still a little too complicated for some applicants and charity trustees, and that it would need to be simplified if that were the desired audience. One frequent request, particularly in the stakeholder meetings, was for a short summary version that could be shared with trustees when they came to see advisors.

SCVO stated:

“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.”

There were a cluster of opinions around finding somewhere in the Guidance to support people in pre-application decision making, with respect to whether charitable status would be the ‘right thing’ for them and, perhaps, sharing other possible ways of structuring their organisation.

3.2 Is the content of the Guidance appropriate? What might be missing and what might be improved?

Overarching themes arising from the consultation were:

- Case studies

The use of case studies was welcomed with both the online respondents and the participants in the meetings feeling that these helped in understanding the meaning behind the text. There was a frequent call to ensure that there were quality case studies for each charitable purpose. There was quite a lot of discussion and comment about whether some of the case studies included were the right ones.

The Scottish Federation of Housing Associations felt that the examples were extremely helpful in explaining each of the charitable purposes and the exceptions. They suggested that one addition might be to provide sector specific examples.

A respondent felt that the addition of case study examples made the Guidance more accessible, and suggested that while 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.”

It was suggested by a number of respondents that a case study with a mix of different areas of the charity test would be helpful and more realistic, highlighting how the test works in practice and how its elements are connected.

- Levels of legal content

While the majority of respondents felt that the tone and approach was the right one, there was a split between those who wanted more simplistic language and those who sought more grounding in the legislation and references to relevant case law.

A respondent suggested that:

“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.”

- Different charitable purposes in England and Wales

Several responses referred to the relevance of charity law in England and Wales for cross border charities; and to the interaction between charity law and tax law. The suggestion was that this should be made clear in the Guidance and links added to HMRC Guidance where appropriate.

- Support for the Guidance being for both new and existing charities

Respondents underlined the importance of the Guidance being relevant for both new and existing charities. Arguments were made for greater emphasis on charities' continuing obligation to meet the charity test.

- Linking Guidance to application form

One theme raised throughout the consultation was the way in which the Guidance could be better linked with the charitable status application form. This would make it easier for applicants to understand the charity test as a whole and to provide OSCR with the right information at the time of their application.

Specific comments on sections of the Guidance:

Many of the discussions and responses focused on specific parts of the charity test, in particular the charitable purposes. Some of the charitable purposes attracted more focus than others, and this is reflected in the analysis.

Introduction

Several respondents, both online and at the events, requested better Guidance on how to write charitable purposes, including distinguishing between a charity's activities and the purposes it was set up to achieve.

DTA Scotland disagreed strongly with the wording set out in the 'How to write charitable purposes' section of the Guidance. It felt that "To advance [charitable purpose] by [very brief outline of activities]", for example, was too prescriptive given the breadth of potential 'community development' activities that development trusts in Scotland undertake.

It argued that charitable development trusts respond to new challenges/opportunities that cannot be foreseen at the outset. However, OSCR agreed that the objects within the governing document can be kept very brief, effectively simply listing the

charitable purpose(s), with the (non-exhaustive) detail of the planned activities being included in the organisation’s application for charitable status.

A respondent highlighted the issue that many charities’ purposes come under more than one charitable purpose and felt that this was not reflected adequately in the Guidance:

“This is a risk as the user may only read the section they consider relevant to their application”.

Another respondent suggested that some of the wording may discourage charities from having more than one charitable purpose, and suggested that the Guidance instead explains that more information is required if the applicant wishes to have more than one charitable purpose. However, they did also welcome the practical Guidance on drafting charitable purposes.

A respondent wrote that the Guidance does not currently address the case of charities that are set up to provide funding for a range of charitable purposes (grant-giving charities), and suggested that some commentary on this would be helpful.

Delegates at the events felt that sometimes people want to future proof their constitutions because funders may ‘favour’ particular purposes. As an example, one delegate mentioned that the equality and diversity purpose needs to highlight more of what it is not, because at the moment it is often included for funding purposes, or because groups feel they have to include it. They suggested that OSCR could be clearer about future activities and purposes (e.g. if it is not in a charity’s three year plan, then it should not be listed in the purposes), and make it clear that the consents process for subsequent changes is straightforward.

(a) the prevention or relief of poverty:

A respondent wrote that 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”.

(b) the advancement of education:

Several delegates at the events felt that this purpose had been greatly improved, and that the distinction between providing information and education did not need any more explanation. However, a number of respondents commented on the paragraph:

To advance education, a charity should present information in a neutral and balanced way. If it reaches conclusions, they should be based on evidence, analysis and reasoning. Information which is provided with the aim of persuading people to form a specific conclusion, or which tries to influence the audience to adopt a viewpoint, does not advance education.

A respondent stated:

“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?”

(c) the advancement of religion:

Several respondents commented on a lack of case study examples for this purpose, given the large percentage of the charities on the Register have the ‘advancement of religion’ as one of their charitable purposes.

A respondent did not agree with OSCR’s analysis that activities advancing other charitable purposes should be specified in a religious charity’s governing document. They argued that “this does not reflect general practice or the current understanding of current religious charities”.

Another respondent also queried the suggestion that the work of many religious organisations in tackling issues of poverty, would need to be reflected with the inclusion of specific charitable purposes (over and above the advancement of religion) within its governing document:

“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”.

The Scottish Churches Committee suggested that ‘the advancement of religion goes far 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”.”

As such, they said that the distribution of ‘Poor or Benevolent Funds’ by congregations and other Church bodies is only done in the “advancement of religion”.

(d) the advancement of health:

Participants at the events felt that the examples for the health purpose were very helpful, and a big improvement. They said it was particularly useful in helping people to understand the advancement of health versus the relief of those in need. One delegate said that health was previously an area where she had had issues, in cases where health is a by-product or indirect benefit e.g. community gardens.

A respondent questioned on what basis OSCR is 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 organisations seeking to carry out activities under this purpose will be undertaking medical research... 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:

DTA Scotland asked that OSCR separate the ‘Community Development’ charitable purpose from the ‘advancement of citizenship’ for the purposes of the Guidance. It argued that the two purposes are both significant but quite different in practical terms. DTA Scotland felt that as it stands currently, the ‘Community Development’ part of purpose (f) has a lower profile than it ought to have within the Guidance. As such, it felt that community development trusts may miss the key importance or relevance of this purpose to them. In addition, a participant at one of the stakeholder events mentioned that it would be helpful to understand the split between ‘community development’ and ‘citizenship’ in this purpose.

At the events, some delegates said that purpose (f) is particularly clear and useful in the Guidance, and is therefore good as a reference for applicants. This purpose helps charities wanting to focus, for example, on social inclusion, without being ‘pigeon-holed’ as a particular kind of charity. However, there needed to be more

reassurance about the term ‘citizenship’ as different connotations exist, for example in relation to immigration status. A number of respondents mentioned that the case studies for purpose (f) focused heavily on ‘community development’ and asked if it would be possible to include one on the ‘citizenship’ aspect of the purpose.

(g) the advancement of the arts, heritage, culture or science:

A respondent said:

“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?”

A respondent wrote:

“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 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.”

(h) the advancement of public participation in sport:

Delegates at the Edinburgh event pointed out that the Guidance currently does not specify if the definition of sport in the 2005 Act: “‘sport’ means sport which involves physical skill and exertion’ refers to physical and/or mental exertion. It was mentioned that Sport Scotland has a list of what is considered to be a sport, but OSCR confirmed that charities are not bound by this list.

(m) the advancement of environmental protection or improvement:

A respondent suggested that it may be helpful for the Guidance to go into more detail about the extent to which charities can be involved in renewables, under this purpose. They said that, given the current interest and activity in this area, a case study might be helpful.

Public Benefit

Many respondents felt that they needed more Guidance on trading and social enterprise, and that there was nothing in the Guidance about charities and trading. Participants at the events said that it would be good to at least have a case study about trading, and how trading might provide public benefit when advancing charitable purposes.

A respondent stated:

“The existing Guidance covering ‘anticipatory’ benefits/charities has fuller detail, and it might be helpful to include more of that material.”

A respondent said:

“We think that it would be helpful to state that this [public benefit] 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.

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.”

Private benefit

Participants said that the case studies were helpful throughout the Guidance, but particularly in the private benefit section. Delegates asked for more case studies illustrating the following points:

- Private versus public benefit, in the context of ‘social enterprise’
- Connected charity trustees.
- A successful application where private benefit issues are overcome.
- A case study that relates to land ownership by a trustee where evidence is required by OSCR to assess private benefit, for example terms of a lease.

Several respondents asked if there could be mention of social enterprise, perhaps in the introduction, as there are cross-over issues with charities and social enterprises. Social enterprise, they said, was particularly an issue for advisors and existing charities who diversified into trading. In social enterprises, the aspect of private benefit has put some people off applying for charitable status. They felt that the remuneration part in the private benefit section of the Guidance was good, as it shows the limits of what is and is not acceptable.

A respondent said:

“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”.

Disbenefit

A participant felt that this was not frequent, but arose especially around environmental concerns, and so the Guidance should stress that disbenefit can apply to just one section of the public – not necessarily the public as a whole.

Specific Exceptions

Use of assets: A few respondents asked for more Guidance on the use of assets. For example, some charities are under the impression that they can only sell assets for the best possible price, even if selling to another charity at a lower price would help achieve the objectives of both charities. Guidance on indirect use of assets e.g. advertising or promoting the charity, would be helpful.

Some expressed the view that an explanation and some examples about what might qualify as an asset would be useful. An explanation of the use of assets in regards to income generation versus charitable activities would also be good, outlining what is and is not allowed.

4. Conclusion

In general, the move towards a more streamlined, clearer charity test Guidance was welcomed. However, the consultation highlighted areas where OSCR needs to reflect further and do additional work to improve the Guidance.

Based on the key themes within the findings, this report makes the following recommendations:

- Include more information in the Guidance about how to write charitable purposes.
- Produce a shorter ‘basics’ leaflet with links to the full Guidance. This would be a document for TSIs and others to hand out.
- Emphasise TSI support more in the Guidance.
- Make the sections on Public Benefit and Exceptions more prominent, as charities need to fulfil these requirements as well as having charitable purposes.

5. Changes made and next steps

In making changes to the Guidance we have carefully considered all the comments provided during the consultation. Some comments related to other areas of charity law and were not specifically about the charity test. Others related to very particular circumstances which we felt were not appropriate for general Guidance.

Many of the comments received did inform our thinking about the final draft and the main changes are listed below:

Changes made to the final guidance	
1	Introduction: added ways to identify relevant purposes in the 'How to write charitable purposes' section
2	Introduction: Examples of governing documents added
3	Education: need for balance and neutrality clarified
4	Religion: section on other charitable purposes removed
5	Sport: definition of sport in the 2005 Act clarified
6	Public benefit: link to public benefit highlighted in each charitable purpose section
7	Disbenefit: section clarified to emphasise that it applies to the public or a section of the public
8	Addition of graphics to illustrate certain concepts
9	New case studies added for the majority of sections

We feel that some of the comments received are better addressed separately and a number tallied with the need for specific Guidance that we had already identified:

Next steps	
Produce a shorter 'brief' guide to the charity test	
Look at the link to the application form and application Guidance	
Produce holistic case studies demonstrating how the different elements of the charity test work together	
Produce specific shorter Guidance on:	<ul style="list-style-type: none"> • grant giving charities • community development trusts • trading and subsidiaries • social enterprise