

# Meeting the Charity Test

Guidance for applicants and existing charities

Scottish Charity Regulator  
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## Public benefit

### Summary

To pass the charity test an organisation must:

- have only charitable purposes, **and**
- have activities which provide public benefit in Scotland or elsewhere.

To see whether an organisation provides public benefit or (in the case of applicants) intends to provide public benefit, we look at what it does or plans to do to achieve its charitable purposes. Having charitable purposes will not on its own mean that the charity test is met; an organisation's activity must also provide public benefit.

### Full Detail

#### What is public benefit?

In general, public benefit is the way that a charity makes a positive difference to the public. Not everything that is of benefit to the public will be charitable. Public benefit in a charitable sense is only provided by activities which are undertaken to advance an organisation's charitable purposes.

Charities can provide public benefit in many different ways and in differing amounts.

Some benefits are easy to understand and measure. If your organisation sets out to help people with a certain type of disease, it is easy to point to the benefit its activities provide in relieving sufferers' symptoms or in curing them. It is more difficult to measure the benefits of other types of charities, for example, a society preserving a part of our heritage, but that does not mean that there is no benefit.

Sometimes there is benefit to the public as a whole from a charity's activities as well as to the people they are directly meant for. An example would be activities that promote literacy and health awareness among women in developing countries. As well as directly benefiting the women concerned, there is indirect benefit to the public in those societies by improving public health, especially in children.

There is no specific level of benefit that a charity must provide; many charities operate on a small scale or in small communities but are still able to show that they do provide public benefit.

When considering if a charity provides public benefit, the activities of the charity need to be looked at as a whole.

Where a charity undertakes:-

- activities which further its charitable purposes; and
- commercial activities to generate income for the charity which do not further its charitable purposes

the overall balance of activities needs to be considered to determine whether the charity does provide public benefit.

If there are extensive commercial activities which make no contribution to a charity's purposes, and the other activities of the charity only make a minor or trivial contribution to its purposes, then on balance the public benefit provided would be insufficient. This is the 'materiality requirement'<sup>1</sup>.

An organisation must actively provide benefit or (in the case of applicants) intend to provide it. In general, if a **charity** does nothing for a prolonged period, it is unlikely to be providing public benefit, and this may result in it failing the **charity test**. There are some exceptions where this principle does not apply. We call these 'inactive charities'.

### Inactive charities

One type of inactive charity is where a charity is set up to act if a particular event occurs in the future, and where public benefit is provided because the charity is there 'just in case'. For example:

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#### <sup>1</sup> Legal Note - Materiality

The assessment of public benefit in the charity test was considered by the Court of Session in an appeal by OSCR against decisions of the Upper Tribunal [OSCR v New Lanark Hotels Limited and New Lanark Trading Limited [2021]CSIH7] [2021csih07.pdf](https://www.scotcourts.gov.uk/2021csih07.pdf) ([scotcourts.gov.uk](https://www.scotcourts.gov.uk)). In this decision it was accepted:-

1. *'That a "materiality" requirement was inherent in the statutory test, there being a minimum level below which any public benefit provided or to be provided would be insufficient to meet the test – a predominant contribution to the charitable purposes had to be shown;*
2. *The activities therefore required to be looked at in the round and as a whole, and a judgement made about whether they provide public benefit;*
3. *Activities the made a minor or trivial contribution to the charitable purposes in the context of other extensive commercial activities making no contribution to those purposes would be insufficient: thus it was accepted that, for example, a trading subsidiary the main activity of which was to sell Christmas cards to raise funds for the primary charity would neither have nor further a charitable purpose. It could pass neither stage of the test under section 7(1). There was no question of suggesting that the charity test could be met by large scale commercial activity by a trading subsidiary which was not in furtherance of any charitable purpose of its own;'*

- a charity is set up to relieve the needs of those who might be made homeless by flooding in a flood-prone area of Scotland – there may be no floods and therefore no activity for several years, but the existence of the charity allows prompt relief should a flood occur.

Another type of inactive charity is a ‘legacy’ charity:

- where one charity is replaced or taken over by another, the charity which has been taken over continues purely to receive legacies and pass them to the new charity – there may be long periods where no money is received or transferred, but the ‘legacy’ charity provides benefit by making sure that donations reach the right destination.

Where a legacy charity remains on the Register, it will still need to meet all the requirements of being a charity. In particular it must:

- meet the charity test
- have charity trustees who comply with all the charity trustee duties
- comply with annual monitoring: preparing and submitting accounts, trustees’ annual report and the Online annual return.

The legacy charity should consider if its governing document needs to be changed. The purposes and powers of the old charity will reflect what it was originally set up to achieve – for instance they may not cover transferring legacy funds to the new charity, and may need to be changed. Other aspects of the governing document may also need to be amended if they no longer fit the new role of the legacy charity, for example the provisions about membership and the holding of meetings.

To make changes to the charity’s purposes you will need our prior **consent**. Other changes should be made in line with the requirements of your charity’s current governing document and then notified to OSCR. See our **[guidance on changing charitable purposes](#)** for more information.

### **What is benefit?**

The ‘benefit’ that charities provide can take many different forms. Some benefits may be clear and measurable. For example, where a charity relieves a person’s sickness or financial hardship, any improvements in the person’s health or financial circumstances can be measured. These benefits could be described as ‘tangible’.

On the other hand, ‘intangible’ benefits may be more difficult to measure, but should still be identifiable. These can include the benefits of education or religion, or promoting appreciation of historic buildings. Both tangible and intangible benefits are taken into account when we assess public benefit.

## What does public mean?

The ‘public’ part of public benefit doesn’t necessarily refer to the general public as a whole. Some charities will potentially benefit everyone in a community. For example, a charity, which has **recreational purposes** where activities are open to all. However, most charities will have limits on who they benefit, and some charities will only benefit a small number of people.

How many people a charity benefits and who they are will depend on the charitable purposes set out in the **governing document**: most charities are established to benefit a particular group. For example, many charities benefit children in general, while others are established to benefit children of a certain age or those with specific needs.



## How does the benefit link to charitable purposes?

Generally, to be taken into account in the assessment of public benefit, an organisation’s activities must be clearly intended to advance its **charitable purposes**.

Where an organisation carries out some activity that is not directly related to or connected with its purposes, any benefit from that activity will not be taken into account in our assessment of public benefit. However, if the activity is genuinely incidental (a by-product of its main activities), then it will not be a problem in terms of the public benefit requirement or the organisation’s duty to act within its charitable purposes.

For example, a community theatre group with the purpose to **advance the arts** also collects cash donations for a local hospice in the intervals of its shows. This activity clearly

doesn't advance the arts, but does not adversely affect the overall picture of the group's public benefit.

If **charity trustees** feel that their charity's activities no longer reflect the purposes in its **governing document**, then they might decide to seek our **consent** to change the charitable purposes. It is good practice to review a charity's governing document on a regular basis to make sure that it is still accurate and relevant for the charity.

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

This is a key part of being a charity. Charities must describe the work that they do, and their achievements, in their **Trustees Annual Report**. This information allows the public to see how much public benefit arises from a charity's activities; it is also important because it requires all charity trustees to review their purposes, activities and achievements annually.

Our Guidance on the individual **charitable purposes** has more information on what activities may provide public benefit in the advancement of each purpose.

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

To be on the **Scottish Charity Register**, an organisation must have only charitable purposes and provide public benefit.

In terms of the 2005 Act, to decide whether an organisation provides public benefit or (in the case of applicants) intends to provide public benefit, the following elements must be considered:

- The comparison between the benefit to the public from an organisation's activities; and
  - any **disbenefit** (which is interpreted as detriment or harm) to the public from the organisation's activities
  - any **private benefit** (benefit to anyone other than the benefit they receive as a member of the public).
- The other factor that we must take into account in reaching a decision on public benefit is whether any condition an organisation imposes on obtaining the benefit it provides is unduly restrictive. This includes fees and charges. See **undue restrictions** for more information.

While considering these factors, we make a judgement on the whole picture of public benefit in the organisation being looked at. We do this based on all the facts and circumstances applying to the organisation, including the balance between activity that furthers the charity's purposes and any other activity.

## **Other information**

### **Fundraising Guidance**

## Private benefit

### Summary

When we decide if an organisation provides public benefit, we must look at:

- whether anyone benefits from the organisation as a private individual other than as a member of the public (this is private benefit)
- how this private benefit compares to any public benefit the organisation provides.

If it appears that the organisation has been set up wholly or mostly for the private benefit of an individual or group of people, it is unlikely that it will pass the charity test.

### Full Detail

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

Individuals can, do, and should benefit from the activities of charities. However, where individuals, other than as a member of the public, benefit from a charity's activities, we will regard this as private benefit.

The fact that some private benefit exists does not on its own mean that an organisation will fail the **charity test**. We look at the private benefit in the context of the whole benefit the organisation provides, or (in the case of applicants) intends to provide in pursuit of its purposes.

To pass the charity test any private benefit must be **incidental** to the organisation's activities that advance its **purposes**:

**Incidental** means that the private benefit is a **necessary** result or by-product of the organisation's activities.

We must make a judgement on the balance between the private benefit and the **public benefit** resulting from the activities of an organisation. If the private benefit is not **incidental** to the activities in pursuit of the organisation's purposes, then we need to consider whether the **charity** is being set up or run for the private benefit of individuals.

For example, a heritage charity plans to use its funds to restore a historic mill belonging to a private individual. The owner will benefit from the value added to his property from this activity. We would need to consider the balance between the private benefit to the owner of the property and the public benefit from the public's continued access to the property



and use for charitable purposes. Where the private benefit appears to be the real purpose rather than being **incidental**, the organisation may fail the **charity test**.

In this case, we would look for reassurances that firm arrangements were in place to make sure that the private benefit to the owner is removed or minimised. Examples of this would be a firm undertaking to transfer ownership to the charity or for it to take a long-term lease of the property.

### **What is incidental private benefit?**

Private benefit is **incidental** when it is a by-product of the provision of benefit in pursuit of a charity's purpose and not a purpose of the charity itself.

A common example of **incidental** private benefit is a charity with paid staff. There is private benefit to the staff, but if the charity cannot operate on a purely voluntary basis, then paying suitable staff at a reasonable rate is **necessary** to the pursuit of its purposes.

In some cases, it will not be clear that paying a salary or providing some other benefit to a particular person is **necessary** to let the charity achieve its aims. In those cases, we need to consider if the private benefit is **incidental** or whether the charity has been set up for the benefit of that person.

Where a charity has members, and the members get particular benefits from the charity, we need to be satisfied that those benefits are **incidental** to the purpose of the charity. Benefits that are trivial or of little value will usually be considered as **incidental**.

Members of a charity can also be the main people who benefit from its activities (for example Girl Guides, Scouts or similar groups). Where a charity directs benefit at its membership, we need to consider how far there is public access to that membership. Any criteria for membership must be justifiable and reasonable bearing in mind the charity's **purposes**. If a charity exists primarily to benefit its members **and** it has a closed or **unduly restricted** membership, then its ability to provide **public benefit** will be in doubt.

For example, a professional body that provides training and improves the standards and status of their profession, will benefit its membership. If the organisation can demonstrate that the focus of its activities is towards the indirect benefit to the public through the maintenance of high professional standards and practice, then the private benefit to the members may be regarded as **incidental**.



### When is private benefit not incidental?

One example is where the main **beneficiaries** of a charity are its members, and all the members are also **charity trustees** (and there are no other potential members or beneficiaries). The charity then exists for self-interest or private benefit only and not **public benefit**.

We have particular concerns where the charity trustees of a charity are the people benefiting from it as private individuals, or where those benefiting most are people connected with the charity trustees such as family members or companies in which the trustees have an interest.

In any case where a charity trustee is **remunerated** for services provided to the charity (including an honorarium), the other charity trustees must make sure that the remuneration conditions set out in **the 2005 Act** are met.

### How we make our decision

We make a judgement on the whole picture of **public benefit** in the organisation being looked at, including:

- the balance of public benefit and **private benefit**
- the balance of public benefit and **disbenefit**
- whether any condition on accessing the benefit is **unduly restrictive**.

We do this based on all the facts and circumstances applying to the organisation.

### Case studies

### **Case 1: an organisation's private benefit to its founders clearly outweighed its proposed public benefit**

#### Summary:

We received an application to become a charity from an organisation which intended to provide counselling services. The organisation had three co-founders (prospective charity trustees); one would be employed as the Chief Executive and the other two as paid counsellors.

#### Considerations:

We acknowledged that it might well be necessary to employ individuals in salaried positions but queried with the applicant why they thought that they were the most suitable people for the positions. The three co-founders alone made the decision to appoint themselves as 'Executive Directors', and drew up a draft governing document which permitted **only** the Executive Directors to be paid. It was not clear if the co-founders had specialist skills and experience which would justify their direct recruitment, or if they had considered carrying out a fair and open recruitment process to identify the most suitable candidates for the positions.

#### Outcome:

The applicants were unable to give us a satisfactory explanation as to why they were best people for the jobs. Taking everything into account, we concluded that this level of private benefit to the co-founders was not incidental and that the private benefit outweighed the benefit to the public. The application to become a charity was refused.

### **Case 2: an organisation's private benefit was unnecessary**

#### Summary:

A commercial company intended to set up a charity to undertake some of its activities, which it had identified as being potentially charitable. The proposed charity would pay a regular fee to the non-charitable company for administration and back office services.

#### Considerations:

The applicant could not provide evidence that provision of those services by the company represented the best value option to the proposed charity or that any other options had been considered. The charity could have carried out its own administration and back office services, or it could have outsourced those activities to another provider following a tender process or other assessment of value.

**Outcome:**

We concluded that the proposed remuneration of the connected company was not incidental because it was not necessary, as there were reasonable alternatives available. We refused the application to become a charity as any potential public benefit was outweighed by this private benefit.

**Case 3: an organisation wanted to raise funds for a sole individual**

**Summary:**

A fundraising organisation had been set up to raise money to pay for an individual's medical treatment for a rare condition. The treatment was only available overseas and was very expensive.

**Considerations:**

The organisation had the charitable purpose of advancing health in their governing document and so met this part of the charity test. However, the organisation made it clear from the outset that the sole beneficiary was one individual and following the end of the treatment the organisation would be closed down.

**Outcome:**

The application to become a charity was refused, as there was clear private benefit that was not incidental.

We frequently see applications of this type and generally have no option but to refuse them. Individuals and organisations wishing to raise money to help fund medical treatment and expenses for a specific person can do so without being a charity.

## Glossary

Terms	Explanation
Assets	This means everything a charity owns: money, equipment, property, including heritable property (such as land, buildings, and rights attached to it).
Beneficiaries	These are the people your charity is set up to help, those who benefit from what you do.
Charitable Purposes	These are the 16 charitable purposes set out in <a href="#">section 7(2) of the 2005 Act</a> .
Charity	An organisation is not a charity in Scotland unless it is entered in the <a href="#">Scottish Charity Register</a> .
Charity Test	<p>This is the test set out under the <a href="#">Charities and Trustee Investment (Scotland) Act 2005</a>, which determines whether an organisation can be a charity.</p> <p>The charity test has two main elements:</p> <ol style="list-style-type: none"> <li>1. an organisation has to show that it has only charitable purposes and</li> <li>2. that it provides public benefit in achieving those purposes.</li> </ol> <p>This is set out in <a href="#">sections 7 and 8 of the 2005 Act</a>.</p>
Charity Trustee	'Charity trustees' are defined in <a href="#">section 106 of the 2005 Act</a> as people having the general control and management of the administration of a charity. Charity Trustees can also sometimes be known as committee members, directors or board members.

Consent	<p><b>Section 16 of the 2005 Act</b> says that you must seek consent before making any of the changes listed below. You need to ask for our consent at least 6 weeks (42 days) before you plan to implement the proposed change.</p> <p>Changes that need our consent are:</p> <ul style="list-style-type: none"> <li>• changing the name of the charity</li> <li>• winding up the charity</li> <li>• amending the objects or purposes of the charity</li> <li>• amalgamating the charity with another body</li> <li>• changing the charity's legal form</li> <li>• applying to the court to change purposes, amalgamate or wind-up.</li> </ul> <p>For more information, see <b>Making Changes to Your Charity</b>.</p>
Disbenefit	<p>This is the opposite of benefit and is equivalent to detriment or harm. This is set out in <b>section 8 (2) (ii) of the 2005 Act</b>.</p>
Governing Document	<p>A governing document (or constitution) is the document (or set of documents) that sets up an organisation and says what its purposes are. It will usually deal with other matters, including who will manage and control the organisation, what its powers are, what it can do with the organisation's money and other assets, and membership of the organisation. For more information, see our <b>FAQs</b>.</p> <p>This is defined in <b>section 106 of the 2005 Act</b>.</p>
Legal Form	<p>Charities can take a number of legal forms. The legal form is the structure or entity, which then becomes a charity. The most common legal forms for charities are:</p>

	<ul style="list-style-type: none"> <li>• Unincorporated associations</li> <li>• Companies</li> <li>• Scottish Charitable Incorporated Organisations (SCIO), and</li> <li>• Trusts.</li> </ul>
Ministerial direction or control	This is where a governing document gives Scottish or UK Ministers the power to direct or otherwise control an organisation's activities. This is set out in <a href="#">section 7 (4) (b) of the 2005 Act</a> .
Private Benefit	This is where benefit is provided to members of the organisation or other individuals not as a member of the public. This is set out in <a href="#">Section 8 (2) (a) (i) of the 2005 Act</a> .
Property	By 'property' we mean all property and assets (money and other assets) belonging to a charity, including heritable property (such as land and buildings and rights attached to it).
Public Benefit	This is the way a charity makes a positive difference to the public through the activities it carries out when advancing its charitable purposes. This is set out in <a href="#">Section 8 of the 2005 Act</a> .
Remuneration	Remuneration in the 2005 Act means any payment or benefit in kind. <a href="#">Sections 67 and 68 of the 2005 Act</a> states that a charity trustee must not be remunerated for services provided to the charity (including services provided in the capacity as a charity trustee or under a contract of employment) from a charity's funds unless certain conditions are met. For more information, see our <a href="#">Trustee Remuneration guide</a> .
The 2005 Act	This means the <a href="#">Charities and Trustee Investment (Scotland) Act 2005</a> , the primary piece of charity law in Scotland.

Scottish Charity Register	This means the register of all Scottish charities kept by OSCR. For more information, see the <a href="#">Scottish Charity Register</a> .
Scottish Charity Regulator	We are the independent regulator and registrar for over 23,500 Scottish charities, established by the 2005 Act. For more information, see <a href="#">About OSCR</a> .
Trustees' Annual Report	The Trustees' Annual Report is the description within the charity's accounts that supports the financial information. It must contain certain information about the charity, including details of the governing document and the main activities the charity has undertaken and its achievements in that financial year.
Undue Restriction	This is a restriction (that cannot be justified) on who can access the benefit provided. This is set out in <a href="#">Section 8 (2) (b) of the 2005 Act</a> .
Wind up	To wind up or dissolve a charity means that the charity ceases to exist. To do this you must first get our consent. For more information, see <a href="#">Making Changes to Your Charity</a> . This is set out in <a href="#">Section 16 of the 2005 Act</a> .