

Meeting the Charity Test Guidance – Consultation Report

1. Introduction

On the 29 January the Court of Session made a decision on the charitable status of New Lanark Hotels Ltd and New Lanark Trading Limited.

The Court directed that both of these companies should be registered as charities on the basis of the facts in the case, and emphasised the nature of the activities undertaken on the almost unique New Lanark World Heritage site. OSCR's intention in bringing the appeals was to clarify the position with respect to our guidance on public benefit in charities. The Court's findings made it clear that charitable status for these companies was in accordance with OSCR's public benefit guidance.

We reflected on the detail of the court's findings on how public benefit should be considered when a charity is undertaking activities, including commercial trading, that do not further its charitable purposes. In the light of this reflection we reviewed our [Meeting the Charity Test Guidance](#). While the Court was clear that we did not need to fundamentally change our guidance, we felt that some minor alterations to both the public and private benefit sections of the guidance would help make things clearer for the reader.

2. The consultation

The changes were relatively minor, and so we designed a simple consultation. We launched the survey on 24 March and it ran for six weeks. The consultation focused on asking questions about the Public Benefit and Private Benefit parts of the Meeting the Charity Test Guidance.

The questions:

1. Are you responding as a: charity trustee/charity volunteer/charity employee/professional advisor/member of the public/other?
2. Do you understand the highlighted paragraphs of the public benefit section of the guidance? (Comments could be added to the response).
3. Do you understand the highlighted paragraphs of the private benefit section of the guidance? (Comments could be added to the response).
4. Overall, do you agree with the proposed changes? (Comments could be added to the response).
5. Do you think the changes will have an impact (positive or negative) on any of the protected characteristic groups? (Comments could be added to the response).
6. Do you agree with your response being made available to the public?

3. The response

We received 37 responses to the survey. In addition we received four direct written responses. The breakdown of those that responded to the online survey can be found below.

Survey question 1:

Type of Respondent	Number of responses	Percentage
Charity Trustee	16	43% ¹
Volunteer	3	8%
Charity Employee	11	30%
Professional Advisor	3	8%
Member of the public	1	3%
Other	3	8%
Total	37	

The direct written responses were received from the Charity Tax Group, the Charity Law Association, Edinburgh Secular Society and the Law Society of Scotland.

The survey is analysed first, with a brief overview of the direct written responses in the subsequent section.

4. What the survey told us

4.1 Survey question 2

Do you understand the highlighted paragraphs of the public benefit section of the guidance?

There were 37 answers to this question. Of these, 30 (81%) said they did, 3 (8%) said they didn't, while 4 (11%) said they were unsure.

This indicates that the respondents felt that the changes were, on the whole, understandable. However, in the comments to the questions where respondents could expand on their point of view, there were interesting reflections that will be taken into account before finalising the guidance.

One reflection was that because of the very specific nature of New Lanark, making changes to the guidance was not necessary and that, in fact, it might create more confusion. Another was on the concentration in the amended guidance on the New Lanark example, thus not emphasising clearly enough the exceptional circumstances involved.

One of the areas of concern that came up in various ways in five of the comments was that the guidance pointed to a need to strike the appropriate balance between

¹ Percentages have been rounded to the nearest whole number.

activity that furthers a charity's purposes and any other activities. However, the guidance might not do enough to help charity trustees understand where that appropriate 'balance' lies.

Those who made that comment, often linked it to a need for better examples and stronger case studies in the document. This was mentioned seven times in the comments.

Clarification was also sought on what would be a 'minimum' level of public benefit where a body also undertook non-charitable commercial trading and how that decision may be made

Three of the respondents felt that the footnote which explained the materiality requirement was not clear or well drafted.

There was a suggestion that a direct link to OSCR's trading guidance would be helpful. It was also pointed out that there was a lack of consistency in language used across the two pieces of guidance and that this should be corrected.

There was one comment about the clarity of language overall. One respondent felt that an externally facing session on the guidance could be useful. Finally, one respondent felt that by taking the action to appeal the decision, OSCR had wasted public money.

4.2 Survey question 3

Do you understand the highlighted paragraphs in the private benefit section of the guidance?

There were 37 responses to this question. Of these, 33 (89%) said they did, 2 (5.5%) said they didn't and 2 (5.5%) said they were unsure.

Again, there were additional comments that made interesting reading.

Many of the comments in this section called for more examples or case studies to demonstrate the considerations OSCR have when assessing private benefit.

In addition, one respondent suggested that including more information on private benefit at the application stage would be helpful; suggested that the guidance implied that private benefit could not be mitigated and pointed out some outdated language in the text.

4.3 Survey question 4

Overall, do you agree with the proposed changes?

Again, 37 people responded. Of these, 26 (70%) agreed, 4 (11%) disagreed and a slightly higher number than with the other questions 7 (19%) were unsure.

This probably reflected the fact that while there was a general understanding of the changes, there were a number of things that needed to be looked at to clarify the guidance further.

The respondents who commented in this section took the chance to repeat earlier comments in order to reinforce them.

5. What the other written submissions told us

As noted above, in addition to the survey we received four written responses.

The response from the Edinburgh Secular Society was concerned with the relationship between religions and charitable status. This is not part of the area of the guidance we are currently consulting on, but the response will be kept on file.

The Charity Law Association pointed out that the position for the charity sector has not changed because of the New Lanark cases, and were not convinced that the changes were needed. They were positive about making minor adjustments for clarification, but suggested that it 'would be better not to include detailed discussion of the New Lanark cases in the public benefit section of the guidance'. They also made the suggestion that it would make sense to make a clearer links with the trading guidance and make sure that the language was consistent between the two pieces of the guidance. The Charity Tax Group sent a short note highlighting their agreement with the Charity Law Association's response.

The Law Society of Scotland highlighted that the New Lanark cases arose from very specific circumstances and that it may be difficult to draw general conclusions that would be of real value to the guidance. They felt if changes are to be made then they should reflect the main thrust of the decision and that any changes should be made to the trading guidance as well to ensure both publications are consistent. They also commented that the issues described in the legal note could be misleading as they were not considered in detail by the court and were not central to the main decision. In addition to their response, the Law Society of Scotland provided their suggested changes to the guidance which included their clarification on how incidental activities, both commercial and otherwise, can be described and explained and clarification on case studies.

6. What will we do with this information

We are very grateful to those who took time to respond to this consultation. We will look at the guidance in the light of the information received. In particular we will:

1. Clearly show the exceptional nature of the New Lanark case
2. Make changes to improve the clarity of the language.
3. Ensure that there is internal consistency in the guidance with respect to language.
4. Remove the legal footnote.
5. Improve the case studies and examples.
6. Revisit our trading guidance in the light of these comments to ensure coherence between the two pieces of guidance.