

Meeting the Charity Test

Initial guidance for applicants and for existing charities



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1. Introduction

The Charities and Trustee Investment (Scotland) Act 2005 (the Act), which came into force in April 2006, introduces a new statutory definition of a charity in Scotland as a body entered on the Register (s.106).¹ Whether an organisation is a charity under the terms of the Act therefore depends on whether a charity has been entered on the Scottish Charity Register.

Section 5 of the Act states that the Office of the Scottish Charity Regulator (OSCR) may enter a new applicant on the Register only if it considers that the applicant meets the charity test. In other words, applicants for charitable status in Scotland must meet the charity test, which itself is set out in s.7(1) of the Act:

7 The charity test

- (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.

Existing charities which were, immediately prior to the commencement of the Act, recognised as a charity in the terms of the previous Scottish legislation² have been entered on the Scottish Charity Register under the transition provisions of s.99 of the Act. In practice this means that each organisation which had been recognised by HM Revenue and Customs as a charity and so has a Scottish charity number has been automatically entered on the Scottish Charity Register.

However, s.99 does not imply that organisations entered in this way on the Scottish Charity Register necessarily meet the charity test, nor does the Act say that an organisation which had once satisfied the charity test will do so forever, regardless of any change in circumstances (for example, a change in what the organisation does).

OSCR is under an obligation to review entries in the Register from time to time (s.3(6)), and to remove from the Register an organisation which no longer meets the charity test (s.30(1)).

¹In this Guidance document, as in all OSCR Guidance, the small s in s.106 or s.7 refers to a section of an Act, in this case section 106 of the Charities and Trustee Investment (Scotland) Act 2005.

²The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990

Meeting the charity test is therefore important not only to those bodies that wish to apply for entry on the Scottish Charity Register and so become charities registered in Scotland, but also to existing charities.

This OSCR Guidance Meeting the Charity Test provides initial guidance on how OSCR will apply the charity test. In it, we will explain what OSCR needs to take into consideration when deciding whether an organisation can be a charity in Scotland. New applicants should read this Guidance alongside the notes that accompany the application form.

2. The Scottish charity test – an overview

The Scottish charity test is a two-part test. First of all, it needs to be established that a body has **only** charitable purposes, and then it needs to be established that the body provides public benefit.

Section 7(2) of the Act sets out 15 different charitable purposes, and a sixteenth category of any other purpose that may reasonably be regarded as analogous to any of the fifteen purposes. Broadly speaking this list covers all purposes which have, over the years, become recognised as being charitable causes, and gives a clear picture of what is considered charitable in terms of the Act.

The activities of a charity must be in furtherance of its charitable purpose(s), and the assessment of whether a body provides public benefit will be made on the basis of its activities. None of the 15 charitable purposes in the Act brings with them a presumption that public benefit is automatically provided by a body which has a particular charitable purpose.

The criteria that OSCR needs to apply in deciding whether a body provides public benefit are set out in s.8, and are, broadly speaking, a reflection of current caselaw and the interpretation that has been followed in recent years by HM Revenue and Customs in recognising charities in Scotland.

In some situations a body cannot be a charity, even though it has only charitable purposes and does provide public benefit. This is the case if the constitution³ allows distribution or use of its property for a purpose which is not charitable; or if the constitution expressly permits Ministers to control or direct its activities; or if it is a political party or if one of its purposes is to advance a political party.

³The Act, in s.106, gives a full explanation of what is meant by the term **constitution** when used in the Act. This depends on the legal form of the charity, for example, in the case of a charitable company it will be its memorandum and articles, in the case of a charitable trust it will be the trust deed, and in other cases it is the document which sets out how the body is set up and what its purposes are.

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In applying the legislation we can look to existing caselaw to assist us in the interpretation of any of the concepts used in the Act (not simply the charity test), but we will not be bound by all caselaw, as there are differences between the charity test as set out in the Act and the definition which the caselaw has developed. OSCR will apply the charity test and the assessment of public benefit in the context of the requirements of the new legislation passed by the Scottish Parliament.

This initial Guidance is the first stage in explaining and clarifying the concepts and principles that make up the Scottish charity test. The Guidance will evolve and develop over the coming years in the light of experience in applying the test.

3. What are the charitable purposes?

The first part of the charity test says that a charity must have only one or more charitable purposes. Section 7(2) of the Act sets out the new charitable purposes while s.7(3) gives a more detailed explanation of what is meant by particular charitable purposes. Reading s.7(2) and s.7(3) together, the following are the charitable purposes in terms of the Scottish charity test:

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a. The prevention or relief of poverty.

Poverty will be interpreted broadly and a person does not have to be destitute to be considered poor. The prevention of poverty includes preventing those who are poor from becoming poorer as well as preventing those who are at risk of being poor from becoming poor.

b. The advancement of education.

This will cover both formal education, such as through schools and universities, and less formal education which may take place in the community. It covers education, training and research and broader education in the development of individual capabilities, skills and understanding.

c. The advancement of religion.

Religion encompasses faith and worship of one or many gods. See also (p) below.

d. The advancement of health (including the prevention or relief of sickness, disease or human suffering).

We will consider health in the context of this purpose to encompass both physical and mental health. The advancement of health can be pursued by conventional methods as well as complementary.

e. The saving of lives.

This includes a range of activity directed towards saving people whose lives are in danger and protecting life.

f. The advancement of citizenship or community development (including rural or urban regeneration and the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities).

This covers a very wide range of purposes, and is focused more on the community rather than the individual.

g. The advancement of the arts, heritage, culture or science.

The advancement of the arts covers art at a national or professional level as well as at a local or amateur level, the provision of arts facilities and encouraging high standards in the arts. Heritage can be seen as part of a country's local or national history and traditions. Advancing heritage includes the preservation of historic land and buildings. The advancement of science includes scientific research and charities connected with learned societies and institutions.

h. The advancement of public participation in sport (and 'sport' means sport which involves physical skill and exertion).

The Act specifies that sport, in the context of this purpose, must involve physical skill **and** exertion. This reflects the fact that the advancement of public participation in sport is included as a charitable purpose mainly because of the health benefits that it can provide. This may restrict the types of sport that can be considered for this charitable purpose.

The provision of facilities and activities related to many sports (whether or not involving physical skill and exertion) may also be considered to be charitable under other purposes, such as (f) or (i).

i. The provision of recreational facilities, or the organisation of recreational activities, with the object of improving the conditions of life for the persons for whom the facilities or activities are primarily intended, and only in relation to recreational facilities or activities which are

- (i) primarily intended for persons who have need of them by reason of their age, ill-health, disability, financial hardship or other disadvantage, or**
- (ii) available to members of the public at large or to male or female members of the public at large.**

This purpose ensures continuity with the Recreational Charities Act 1958 which states that the provision of recreational facilities in the interest of social welfare is

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charitable and so ensures that purposes that were regarded (by HM Revenue and Customs) as charitable under the 1958 Act will continue to be charitable.

However, charities (and applicants for entry on the Register) that have such charitable purposes must, as part of the charity test, provide public benefit, in the same way that any other charities (or applicants) must.

j. The advancement of human rights, conflict resolution or reconciliation.

This covers relieving the victims of human rights abuse, raising awareness of human rights, and securing the enforcement of human rights law. It covers the resolution of international conflicts and relieving the suffering, poverty and distress arising through conflict at a national or international scale by identifying the causes of the conflict and seeking to resolve such a conflict. It includes the promotion of restorative justice and mediation or reconciliation between persons, organisations, authorities or groups.

k. The promotion of religious or racial harmony.

This covers purposes which actively aim to promote harmony and the lessening of conflict between people from different races, religions or belief systems.

l. The promotion of equality and diversity.

This covers the elimination of discrimination and promotion of diversity in society.

m. The advancement of environmental protection or improvement.

The advancement of environmental protection or improvement includes preservation and conservation of the natural environment and the promotion of sustainable development. It includes the conservation of a particular animal, bird, or wildlife in general; a specific plant species or habitat or area of land or water, including areas of natural beauty and scientific interest.

n. The relief of those in need by reason of age, ill-health, disability, financial hardship or other disadvantage (including relief given by the provision of accommodation or care).

This purpose will be relevant to organisations concerned with the care or upbringing of children or young people (for example children's homes) or organisations concerned with the relief of effects of old age or disability (for example by providing specialist advice or equipment, drop-in centres). It will also be relevant to housing associations and Registered Social Landlords.

o. The advancement of animal welfare.

The advancement of animal welfare includes any purpose directed towards the prevention or suppression of cruelty to animals or the prevention or relief of suffering by animals.

p. Any other purpose that may reasonably be regarded as analogous to any of the preceding purposes (and the advancement of any philosophical belief (whether or not involving belief in a god) is analogous to the purpose set out in (c) above).

This purpose provides the necessary flexibility to allow charitable purposes to evolve as society changes. However, because it requires analogy with the purposes listed, parameters have been set around how and to what extent new purposes can evolve, which should give certainty and stability to charities, applicants and the public.

4. How will OSCR consider charitable purposes?

We will consider whether a body's purposes are charitable on the basis of how its purposes are set out in the existing or proposed constitution.⁴ The purposes are usually set out in a single clause or paragraph at the beginning of a body's constitution, and will describe and identify the purpose for which a body has been set up. They do not say what it will do on a day to day basis.

It is not necessary for the existing or proposed constitution to use the exact phrasing from the legislation to describe what the body's purposes are or will be. Sometimes the language used may be quite different, though OSCR should be able to make a reasonable judgement, on the basis of the constitution itself, about how the purposes or objects of the body relate to the charitable purposes set out in the Act.

A constitution should give a reasonably accurate reflection of the actual purpose of the individual body. For example, to advance education as a purpose will in most cases not describe the purpose of a particular body sufficiently accurately, whereas to advance the education of the public in the subject of physics would do so better. Equally, to promote and ensure the provision of services for mediation and conciliation between victims of crime and offenders with a view to preservation and protection of the well-being of such victims and the rehabilitation of such offenders is a more accurate and meaningful purpose than to advance reconciliation and conflict resolution .

At the same time the charitable purpose(s) of the body should not be confused with the specific activities the body will undertake in furtherance of its charitable purposes, not least because a restrictively drawn purpose is likely to become outdated more quickly. For example to provide monthly lectures and leaflets on the subject of physics to the public , although falling within the charitable purpose of the advancement of education could be too restrictive as a suitable purpose (as opposed to an activity).

If we come across purposes which appear to be statements of (intended) activities we will advise an applicant of this and suggest that the body adopts amendments to ensure the purposes are indeed purposes rather than activities.

⁴See footnote 3

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If, at the application stage or at a later review stage, it appears to OSCR that the applicant s (or charity s) activities diverge significantly from its stated charitable purposes, we will bring this to the applicant s or charity s attention. As a charity s activities should be in furtherance of its charitable purposes, the applicant or charity in such circumstances would have to consider amending its purposes or its activities.

It is entirely possible for a body to have more than one charitable purpose, or for the purposes set out in its constitution to be charitable under more than one of the purposes listed in the Act. For example, a body may have as its purpose to advance education in the arts and to promote the arts by the establishment of an art gallery in X location . Another example is the purpose to assist people in any part of the world who are victims of war or natural disaster, in particular by the supply of medical aid to such persons , which could fall within the charitable purposes of the advancement of health, the saving of lives or possibly the relief of those in need by reason of other disadvantage.

5. Specific exceptions

In some situations a body cannot be a charity, even though it appears to have charitable purposes and provide public benefit. This is the case if the constitution allows distribution or use of its property for a purpose which is not charitable; or if the constitution expressly permits Ministers to control or direct its activities; or if it is a political party or if one of its purposes is to advance a political party.

5.1 Non-property distributing

Section 7(4)(a) of the Act states a body cannot be a charity if its constitution allows it to distribute or otherwise apply any of its property for a non-charitable purpose, whether on being wound up or at any other time. For example, an organisation whose constitution says that, when it is wound up, the building that it owns and operates from should revert to the ownership of the family of the original donor of the building cannot be a charity. Equally, an organisation whose constitution provides that on an annual basis a certain percentage of the surplus income (or year end balance or operating profit) should be returned to the founders, or should be distributed amongst the trustees, cannot be a charity.

In the context of the charity test there is no strict requirement that the constitution must state that the property can, on winding-up, only be transferred to a charity registered in Scotland. A winding-up clause in the constitution of a charity registered in Scotland that provides that on winding-up the property should go to its (English) parent or sister organisation is acceptable, provided that that organisation s purposes are charitable. It may also be possible to include a clause that for example provides that the property will be transferred to a local authority, so long as there is a very clear stipulation that in such a case the property will only be used and continue to be used for a particular charitable purpose.

5.2 No ministerial control

To be a charity in Scotland an organisation needs to be independent from the control of Scottish Ministers or a Minister of the Crown (section 7 (4)(b)). If an organisation's constitution expressly permits Scottish Ministers or a Minister of the Crown to direct or otherwise control its activities, it cannot be a charity.

Section 106 of the Act provides the definition of a constitution. Depending on the particular type of body this means its memorandum and articles of association; the trust deed; an SCIO constitution; the enactment which establishes it and states its purposes; a Royal charter or warrant; or more generally the instrument which establishes it and states its purposes. A Funding Agreement or Service Level Agreement is not a constitution.

There is no specific stipulation in the Act that charities' constitutions must be independent of any third party other than Ministers. However, the Act is explicit about the duties of charity trustees and the need to guard against conflicts of interest (s.66). All charity trustees therefore need to be alert to the issue of effective operational independence, although it is not part of the charity test.

5.3 No party political purposes

Even if it appears to have charitable purposes and provide public benefit an organisation cannot be a charity if it is, or if one of its purposes is to advance, a political party (section 7(4)(c)).

However, a charity would be able to engage in campaigning in order to further its charitable purposes and may use political means to further its charitable purposes without jeopardising charitable status. The Scottish charity test therefore does not, in principle, prevent charities from campaigning. However, if a (prospective) charity's (intended) activities include campaigning, the public benefit requirement would need to be met just as in any other case.

6. Public benefit – an overview

The second part of the charity test requires that a body provides (or, in the case of a potential applicant) intends to provide, public benefit in Scotland or elsewhere.

It is important to be aware that, to be a charity in terms of the Act, it is not necessary that public benefit is provided in Scotland. Public benefit may be provided in Scotland or elsewhere, for example when overseas aid or development agencies provide benefit mainly or exclusively abroad, or when an organisation has operations throughout the UK.

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The concept of public benefit is not new, but section 8 of the Act sets out in particular what OSCR must have regard to when determining whether a body provides or intends to provide public benefit:

8 Public benefit

- (1) No particular purpose is, for the purposes of establishing whether the charity test has been met, to be presumed to be for the public benefit.
- (2) In determining whether a body provides or intends to provide public benefit, regard must be had to —
 - (a) how any —
 - (i) benefit gained or likely to be gained by members of the body or any other persons (other than as members of the public), and
 - (ii) disbenefit incurred or likely to be incurred by the public, in consequence of the body exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence, and
 - (b) where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit (including any charge or fee) is unduly restrictive.

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The Act therefore does not give a definition of what is and what is not public benefit, but instead sets out what OSCR must take into account when deciding whether or not a body provides or intends to provide public benefit. We will make this assessment on the basis of a body's (intended) activities and will look at whether in practice, as a result of the activities carried out in furtherance of its charitable purposes, a body provides public benefit. We expect applicants and charities to be able to identify and describe the benefit that is provided but we recognise that the nature of the benefit can vary enormously from one organisation to another in the nature of what is provided, the scale, and how immediate or visible is the impact or result.

In essence OSCR is required to make a judgment on the balance of public benefit versus any private benefit or any disbenefit, and must also make a judgement on whether any unduly restrictive conditions apply in obtaining the benefit that is provided. These concepts will be explained below.

7. Aspects of public benefit

7.1 What is 'benefit'?

Benefit provided by charities or organisations that wish to become charities can take many different forms. Some benefits may be material or measurable. For example, if a charity relieves a person's sickness or financial hardship, the person's health or financial

circumstances can be measurably improved. Such 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, for example, many of the benefits of education or religion, or promoting appreciation of historic buildings. Both tangible and intangible benefits will be taken into account.

Indirect as well as direct benefits will be taken into account in assessing whether a body provides (or intends to provide) benefit to the public. A direct benefit is one which is directly related to the activities carried out in pursuit of the charitable purpose and benefits the intended group of beneficiaries. For example, there is a direct benefit to the people who receive medical care if they are sick; to the people whose conditions in life have been improved by taking part in recreational activities; or to the people whose skills have been developed by taking part in a training programme. Indirect benefit exists when the benefit can be said to extend beyond the immediate beneficiaries, in many cases to the public generally, for example:

- ¥ promoting literacy and health awareness among women in developing countries (as well as directly benefiting the women concerned) indirectly benefits the public at large in those societies by improving public, especially child, health
- ¥ providing support and counselling to victims of racial attacks (as well as directly benefiting the victims) indirectly benefits society as a whole by encouraging racial harmony.

In most cases a charity will provide both direct and indirect benefits as a result of its activities, but in different degrees depending on individual circumstances.

For the purposes of the charity test where a benefit that is provided is to be taken into account there needs to be a link between a body's charitable purposes, its activities in furtherance of those purposes and the public benefit that arises from those activities. If the link is not clear, the benefit is not relevant to determining whether public benefit is provided for the purpose of the charity test. For example, benefit provided to adult members of the community when a school makes its playing fields available for use by sports clubs is not relevant when the charitable purpose is to advance the education of primary school-age children, and the benefit provided to historians and other interested members of the public when a church makes its records publicly available for historical research is not relevant when the charitable purpose is to advance the Christian faith. There needs to be a link between activities and the reason the charity was set up and recognised as having charitable purposes.

That does not mean however that if some benefit is provided that is unrelated to the stated charitable purposes that therefore the public benefit assessment will be failed. We will consider the situation as a whole — what is required is that the overall picture is one of

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predominantly providing public benefit through the activities in furtherance of the charitable purposes.

7.2 Providing benefit

The Act does not set a minimum of benefit that needs to be provided before public benefit can be said to be provided. In other words, OSCR does not make a judgement on the effectiveness or efficiency of the charity in providing benefit, nor is there an absolute volume or impact threshold. The benefit provided will inevitably reflect a charity's size to a certain degree. However, intention is not sufficient.

In s.7 of the Act the intention to provide public benefit is limited to applicants for charitable status. Existing charities must therefore in some way actively provide, and not simply intend to provide, public benefit. This means that there must be activity on the part of an existing charity in the pursuit of their stated purposes.

In assessing whether a charity actively provides public benefit we will take a reasonable, fair and proportionate approach and acknowledge that different charities will have very different levels of activity. We acknowledge that there may be periods of apparent inactivity in a charity's existence, but expect these to be of limited duration. Examples of situations that might arise include:

- ¥ Accumulation of reserves or funds. A charity may be accumulating reserves or funds in preparation for a particular capital project or programme of activity, but not have any other activity at this point in time. This could be regarded as providing benefit but would need to be clearly stated in the charity trustees' Annual Report, and the notes to any reserves policy.
- ¥ Research as activity. Some charities may have this as their primary activity — for example medical charities or campaigning charities. However, there may be other charities where research is undertaken to support, guide or inform other activity. We recognise that the outcome of research cannot be predicted, and that in the longer term even negative results can provide a degree of public benefit. Where research is ongoing we will expect the charity trustees' Annual Report to indicate what progress is being made and what is a realistic anticipated timetable for the conclusion of particular projects, in particular where further, primary activity, is dependent on this.
- ¥ The award of grants to charities or other bodies can fall within the definition of providing public benefit. While larger organisations may have a rolling programme of grant giving, many smaller charities will make awards only once a year or possibly less often (for example, there may be a three-year cycle of grant giving with little activity in between). Again, we would expect the charity trustees' policy to be clearly stated in charity trustees' Annual Reports.

Where there is no activity, and we can establish that a charity is not providing any public benefit, OSCR has both the power and the duty to issue directions or to remove the body from the Register (s.30) on the basis that the body has failed the charity test.

7.3 What is ‘the public’?

We will consider the extent to which the public at large, or a sufficient section of the public, benefits from the activities of the (prospective) charity. This is not simply a matter of numbers and will vary from case to case depending upon the organisation’s purposes as well as activities. What must be considered in each case is whether any criteria for and limitations on who benefits are justifiable and reasonable given the nature of the charitable purpose and whether those who can benefit constitute overall a sufficient section of the public.

Most charities have a limited number of potential beneficiaries. There may be criteria on who can benefit based on need (such as sickness or financial hardship for example), based on a particular geographical area, or other criteria, provided that the access is sufficiently open in nature and the criteria are consistent with the charitable purpose being pursued.

If the organisation’s benefits are potentially available to anyone who, falling within the (acceptable) criteria, chooses to take advantage of them, it can be considered to provide benefit to the public, even though in some cases the actual number of beneficiaries may be quite small. For example, an organisation may offer only a small number of places for the services it provides, such as a small number of available rooms in a care home, but those places are open to a sufficient section of the public to apply for them. A different example may be where the organisation offers benefit to all members of a specific ethnic group in a rural locality where the actual number of people who may benefit is very small. It can also be possible to show that a benefit to a very small section of the public benefits the public as a whole as well. For example, an organisation working to relieve the suffering caused by a very rare disease will provide benefit to the public even though few actual people would need to use its services.

7.4 The extent to which the benefit is private

OSCR will need to look at the extent to which benefit is enjoyed by members of the (prospective) charity or by other persons (other than as members of the public), for example by the (prospective) charity trustees, the organisation’s members or its employees. In other words — OSCR needs to look at whether any individuals benefit from the charity as private individuals rather than as members of the public, and at the extent to which this is the case.

Individuals can, do, and should, benefit from the activities of charities. However, the benefit to an individual should be directly related to and in furtherance of the charity’s purposes, for example when an individual benefits from medical care that is given by a charity set up to relieve illness. Where this is not the case, the private benefit should be necessary or

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incidental to the pursuit of the charity's purposes. For example, it is acceptable to pay (reasonable) salaries to staff, which although being a private benefit to the staff, are also a necessary expense in the pursuit of the charity's purpose.

The way in which private benefit applies to membership organisations warrants specific mention. It is, in principle, acceptable for charities to adopt membership structures. Where (prospective) charities do so, and the members are given special benefits by the charity, we will need to be satisfied that such benefits are reasonable and necessary or incidental to the purpose of the charity. Benefits that are inconsequential or of little measurable value will not usually cause a problem. For example, a membership based organisation set up to promote the conservation of wildlife may give some specific benefits to its members such as free or reduced price publications.

It may however also be that the members of the charity are also the main beneficiaries of the charity (for example a housing association which provides housing for its members). Where the charity's benefit is directed at its membership then we will need to consider public access to such membership, and whether the membership criteria are justifiable and reasonable given the nature of the charitable purpose. (Prospective) charities, which exist to primarily benefit their members, and which have a closed or unduly restricted membership, will not be considered as providing a public benefit.

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We recognise that membership organisations are constitutionally varied so in some instances it may be that members (who are beneficiaries) are also charity trustees. While membership charities will be able to draw their charity trustees from their membership and these charity trustees will be able to continue to receive the same benefits as any other member, they will have to pay particular attention to the charity trustees' duty to act in the interests of the charity and avoid conflicts of interest (s.66 of the Act — see also OSCR Guidance on charity trustee duties).

However if, in the instance of a (prospective) charity whose main beneficiaries are its members, all the members of the (prospective) charity are also (proposed) charity trustees (and there are no other potential members or beneficiaries), then the (prospective) charity exists for self-interest or private benefit only and cannot be said to provide public benefit.

Finally, we must make a judgement on the balance between the private benefit and the public benefit resulting from the activities of the (prospective) charity. The fact that some private benefit exists in itself does not immediately mean the charity test is not met. The private benefit needs to be seen in the context of the benefit the organisation provides as a whole.

7.5 The extent to which there is disbenefit

The achievement or pursuit of charitable purposes may provide benefit to the public but it may also cause disbenefit — the term used in the Act. Disbenefit is more than the mere absence of benefit, and our view is that it is equivalent to harm. We need to consider whether the (prospective) charity, in pursuing its purposes, causes disbenefit to the public, and the extent to which that is the case compared to the public benefit that is provided. The fact that some disbenefit results from the activities of the charity in itself does not mean that the charity test is not met. If, taken into account all the (prospective) charity does, the disbenefit or harm to the public outweighs the benefits, then public benefit would not be provided.

In considering whether there is disbenefit to the public, the same general principles will apply as when deciding whether there is benefit to the public. As with benefit, disbenefit or harm can vary in nature, scale and how immediate or visible the impact or result is, but, as with benefit, it should be possible to identify and describe the disbenefit or harm caused. To be taken into account, the disbenefit or harm should affect the public at large or a sufficient or relevant section of the public. For example, the neighbours of a hostel for homeless people may argue that the activities of the charity cause a disbenefit as the hostel may affect the value of their property, but this is likely to be a private disbenefit. The fact that OSCR needs to consider the presence and extent of disbenefit does not translate into a third party right of objection in the application process. On the other hand, if a body were set up with the purpose of promoting the welfare of pigeons in the city of X, and its activities were to distribute pigeon feed in the city's squares, then the disbenefit or harm that would result to the public due to the increasing numbers of pigeons and the accompanying public health hazard might outweigh the public benefit provided.

Many of the everyday actions of organisations (and individuals) may cause a degree of harm to others, either directly or indirectly. This fact should not unnecessarily stifle the operations of charities. Where any disbenefit caused is due to reasonable and necessary actions in connection with the (prospective) charity's purpose and is the inevitable and generally accepted result of such actions in the society in which they take place, then such disbenefit may be largely disregarded (for example, when a degree of harm to the public is caused (by road accidents and pollution) by charities that need to use cars in the delivery of services to their beneficiaries).

It is worth noting that the Act draws a distinction between disbenefit and unduly restrictive conditions (including any charge or fee). The mere imposition of charges or fees is therefore not to be considered a disbenefit: rather, the level of charges or fees must be considered in the context of the provision of benefit to a section of the public and the relative impact such fees, charges or other restrictions have.

7.6 Are there unduly restrictive conditions?

Finally, we need to consider whether any condition on obtaining the benefit (including the charging of any fee) is unduly restrictive.

As discussed already (prospective) charities can have criteria for who may benefit, so long as these are justifiable and reasonable given the nature of the charitable purpose being pursued and provided those who can benefit constitute overall a sufficient section of the public. For example, a charity may be established for the relief of the elderly in Aberdeenshire, and another may be established for the provision of pre-school education by running a playgroup for under 5 year olds in Dumbarton. In both cases there are criteria of age and geography that determine who can access the benefits provided by the charity.

There may be circumstances in which (prospective) charities (intend to) place further conditions on obtaining the benefits from its activities over and above such criteria, and where such conditions are not directly related to the charitable purposes of the organisation. The Act mentions in particular a charge or a fee as a possible unduly restrictive condition, but there are other conditions that could be unduly restrictive, if unrelated to the charitable purpose of the organisation, such as such as gender or racial restrictions.

(i) Charges or fees as unduly restrictive conditions

Generally speaking (prospective) charities may charge their users for access to their services and facilities, and indeed many do. These include, for example: educational organisations (such as schools and universities); care homes; recreational charities (such as sports centres, recreation grounds or village halls) that charge for hire of facilities; theatres, museums and stately homes which charge entry to view performances, exhibits, land or property; charities that charge for membership; and charities that charge for publications. A charity may charge fees which more than cover the cost of the services or facilities it provides. This is acceptable provided that the income generated is used in pursuing the charity's purposes, for example in maintaining or developing the service being provided.

OSCR needs to make an assessment as to whether a charge or a fee is an unduly restrictive condition on obtaining the benefit from a charity. The Act, in stating that a condition may not be unduly restrictive, accepts that there may be a certain level of restriction. The issue is whether any condition is unduly restrictive: in other words, whether it is excessively restrictive or restrictive in contradiction of moral or legal standards.⁵ The fact that a (prospective) charity provides benefits that will be charged for and will be provided mainly to people who can afford to pay the charges does not necessarily mean that the organisation is not set up for and does not operate for the benefit of the public.

⁵Unduly: (1) immoderately; excessively. (2) in contradiction of moral or legal standards. *Collins Dictionary of the English Language, second edition, 1986.*

In cases where a (prospective) charity sets restrictive charges or fees as a condition on obtaining the benefit from the (prospective) charity, OSCR will consider the following in deciding whether or not this constitutes an unduly restrictive condition:

¥ To what extent is access for beneficiaries to the benefit actually restricted in practice?

In this context it does not matter who actually pays the fees: what matters is whether or not reasonable access is available. We will consider whether there are means by which potential beneficiaries who would otherwise be excluded from the benefit can still access the benefit, and whether this results in a reasonable and acceptable level of access.

This may be relevant in a variety of circumstances. For example, a charity that provides residential accommodation for children with behavioural difficulties may charge a weekly fee that is beyond the affordability of most parents. However, the local authority will in many such cases pay the fees, and access is therefore determined primarily by whether the criteria set by the local authority in such circumstances are fulfilled. Where a local authority applies criteria in exercise of a statutory duty, this will be a strong indicator that this results in a reasonable and acceptable level of access.

¥ What is the level of the charge or fee in relation to the cost of providing the service?

We will take account of the cost of the benefit that is being charged for, and the extent to which the true costs are or are not fully charged to an individual beneficiary. Some services provided by charities are very expensive to provide, and donations from the public or grants from private or public bodies may only partly cover the cost of providing a service. A fee or charge may still be made that is outwith the reach of some, yet this charge to an individual would not represent the true cost. This may therefore result in an acceptable level of access to a benefit that would otherwise be wholly inaccessible.

(ii) Other unduly restrictive conditions

Where an organisation is set up to provide or maintain particular facilities for the benefit of the public, any restrictions on public access (such as limited opening hours, limitations on what areas people actually have access to, or restrictions on, access for people of limited mobility) must be reasonable and appropriate in the circumstances. The fact that restrictions exist in itself does not mean that the organisation does not provide public benefit. However, the restrictions may be undue when they are so extensive as to effectively prevent access to the charitable benefit for the majority of potential or intended beneficiaries, and no alternatives are in place or adjustments have been made.

It is possible for charities to be set up for the provision of benefit to persons of a specific racial or ethnic group, gender or religious belief. In such cases there may well be criteria for who the beneficiaries are based on gender, ethnicity or religion and these may be acceptable if they are reasonable and justifiable in the context of the purpose of the organisation.

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However, there may be circumstances in which explicit or implicit conditions are in place which restrict access to the benefits provided to persons of a particular gender, religion or race or ethnicity in a way that is entirely unrelated to the purpose of the organisation. Where this is the case and the condition on access to the charitable benefit would not be allowable under anti-discrimination law (Race Relations Act 1976; Race Relations (Amendment) Act 2000; Sex Discrimination Act 1975; Disability Discrimination Act 1995) then OSCR will consider such a condition to be unduly restrictive.

7.7 Deciding on public benefit

When assessing whether public benefit is provided, OSCR will not consider any of the aspects above in isolation. We believe that the essence of the public benefit test is that an overview is taken of the whole of an organisation's activity, and that a decision is reached having regard to all the aspects. OSCR will need to reach a judgement whether, when all aspects are taken into account, on balance public benefit is provided.

8. How to demonstrate public benefit

OSCR will assess whether an organisation provides or intends to provide public benefit on the basis of the organisation's (intended) activities. We will therefore need to have a picture of the (intended) activities, which generally will not be available from the (proposed) constitution. However, this kind of information is often already available in documents prepared by the (prospective) charity for other purposes, such as when drawing up a plan of activity for the (proposed) charity (or in some cases a full business or organisational plan), in Annual Reports, funding applications, etc. Depending on the size of the (prospective) charity and the scale of its operation such documents will be more or less formal and expansive.

We will ask a prospective charity (in the case of a new application) or an existing charity (in the case of a review of charitable status) to provide a brief statement of its (intended) activities, and supplement this with any documents it has already available that describe its (intended) activities. Where such documents are not available, a fuller statement of the (intended) activities may be necessary if the initial statement did not give enough information for OSCR to base its assessment on. The application form will provide notes and examples on what to include in the statement of activities.

In addition, OSCR will ask whether there will be any condition on obtaining the benefit (such as whether the (prospective) charity charges (or intends to charge) for its services). Where this is the case we may need to ask for more information. We believe that this will make the assessment of this aspect of the public benefit test easier for both OSCR and the (prospective) charity.

8.1 New applications

When OSCR considers, on the basis of the information provided, that the organisation would not meet the public benefit requirement or a different aspect of the charity test, we will in the first instance discuss with the applicant how to alter or restructure its purposes or activities to enable it to meet the requirement. Where public benefit cannot be demonstrated, the organisation cannot be registered because it will not qualify as a charity.

8.2 Review of existing charities

In the case of existing charities, where it appears to OSCR as a result of a review or other inquiries that an individual charity is not providing public benefit, or does in any other way not meet the charity test, then OSCR will need to take further action.

Where a charity is not providing public benefit but may be able to do so, OSCR will, in the first instance, advise the charity to change its activities (and possibly its stated purposes) so that it can demonstrate it provides public benefit. OSCR might also use regulatory powers to issue directions to this effect if the charity trustees are not co-operating, although we anticipate we would need to do this in only in a very few cases.

However, there may ultimately be cases where an organisation simply cannot, or is unwilling in all the circumstances, to provide public benefit. In these cases OSCR's regulatory intervention might include removing the organisation from the Scottish Charity Register and making a legal scheme to ensure that any charitable assets of the organisation will in the future be applied for other, similar, charitable purposes to those of the organisation that ceased to be charitable. This would only happen where it was not possible for an organisation to restructure or refocus to meet the public benefit requirement.

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