



# Meeting the Charity Test:

## Guidance for applicants and for existing charities



Office of the Scottish **Charity Regulator**



## MEETING THE CHARITY TEST

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### 1. Introduction

The Charities and Trustee Investment (Scotland) Act 2005 ('the 2005 Act'), which came into force in April 2006, introduced a statutory definition of a charity in Scotland as 'a body entered in the register' (s.106 – an 's.' here and throughout this guidance refers to a section of the 2005 Act). Whether an organisation is a charity under the Act therefore depends on whether it has been entered in the Scottish Charity Register ('the Register').

Section 5 of the Act states that the Office of the Scottish Charity Regulator (OSCR) may enter a new applicant in 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 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 bodies which were, up to the time the 2005 Act came into force in April 2006, recognised as charities in the terms of the previous Scottish legislation (The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990) have been entered in the Scottish Charity Register under the transition provisions of s.99 of the 2005 Act. In practice this means that each organisation which had been recognised by HM Revenue and Customs as a charity and so had a Scottish charity number has been automatically entered in the Register.

However, s.99 does not imply that organisations entered in this way in the Scottish Charity Register necessarily meet the charity test, nor does the 2005 Act say that a body which has once satisfied the charity test will continue do so, regardless of any change in circumstances (for example, a change in what the body 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 a body which no longer meets the charity test (s.30(1)). We are examining entries in the Register through our 'Rolling Review' programme, which includes a proportion of charities that we have reason to believe are at risk of not meeting the charity test (for further information see the *Rolling Review Pilot Study Report* and *Rolling Review Phase 1a Report* on OSCR's website [www.oscr.org.uk](http://www.oscr.org.uk)).

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

In this publication we provide guidance as to how OSCR applies the charity test. We explain what OSCR takes into consideration when deciding whether an organisation can become, or continue to be, a charity in Scotland.

## 2. The Scottish charity test – an overview

The Scottish charity test can be described in four parts. To be a charity the following requirements must be met:

1. a body must have **only** charitable purposes
2. its constitution must be acceptable in other respects:
  - it must not allow the body's property to be used for non-charitable purposes
  - it must not expressly permit Ministers to direct or otherwise control the body's activities
  - the body must not be a political party and must not have as its purpose the advancement of a political party.
3. the body must provide or intend to provide public benefit
4. in determining whether public benefit is provided by the body's activities OSCR must have regard to:
  - how any private benefit is balanced against benefit to the public
  - how any disbenefit to the public is balanced against benefit to the public
  - whether there are any unduly restrictive conditions on obtaining the benefit the body provides.

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 those 15 purposes. In many cases the purposes in the list reflect those which had been recognised as charitable under previous legislation and case law. However, s.8(1) of the Act emphasises that we cannot automatically assume that a body which has any of these charitable purposes will provide public benefit.

The activities of a charity must be in furtherance of its charitable purpose(s), and we will assess whether a body provides public benefit on the basis of its activities.

In addition to the requirements of the charity test itself the Act provides that we must refuse to enter in the Register a body if it has an objectionable name as laid down in s.10. For further details of how we look at this, please see OSCR's *Consents and Notifications* guidance, available on the OSCR website [www.oscr.org.uk](http://www.oscr.org.uk).

This guidance on meeting the charity test will continue to evolve and develop over the coming years in the light of experience in applying the charity test.

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### The charity test and case law

Scotland is a separate jurisdiction in relation to charity law, and the 2005 Act is the main authority governing charity law in Scotland. In applying the charity test OSCR will follow standard principles of legal interpretation. This will include looking at:

- the 2005 Act
- case law in Scotland
- other relevant material including case law in other jurisdictions (for instance in England and Wales).

Case law from jurisdictions other than Scotland will be persuasive rather than binding.

### The charity test in England and Wales

The regulation of charities is a devolved matter in Scotland. However, there are some similarities between the Charities Act 2006 (in England and Wales) and the 2005 Act: in both jurisdictions charitable purpose and public benefit are the key concepts in deciding whether organisations can be considered as charities.

Nevertheless, there are some differences:

- the lists of charitable purposes in the two Acts are not identical.
- in Scotland, public benefit is assessed on the basis of how a body exercises its functions; in England and Wales, the issue is whether a particular charitable purpose is for the public benefit
- the position in England and Wales as regards ministerial direction and control and advancement of political parties (see point 5) is different.

**These differences have a number of possible consequences for charities or applicants for charitable status (see point 5.1).**

## 3. What are the charitable purposes?

The first part of the charity test says that a charity must have only charitable purposes. It may have one or more of these. Section 7(2) of the Act sets out the charitable purposes while s.7(3) gives a more detailed explanation of what is meant by some of the charitable purposes.

This part of the guidance sets out the charitable purposes, together with some brief guidance on particular issues which may arise when we look at public benefit. Where the benefit to the public under any of the purposes through a particular activity is in question, we may ask applicants for independent evidence. Please see the individual entries for details.

**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. Activity which enables individuals or groups to escape or avoid poverty (such as training for work skills, or encouragement of Fair Trade activities) may provide benefit under this purpose, as may direct assistance by monetary payments or in kind to those suffering poverty. It must be possible to demonstrate that such activities are clearly targeted at people suffering, or at risk of poverty.

**b. The advancement of education.**

This will cover both formal education, such as that provided 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. Provision of public worship can provide benefit under this purpose, by enhancing spiritual well-being and a sense of spiritual and moral solidarity. Other activities such as religious instruction and dissemination of religious texts and materials may also provide benefit in the same way. Where the doctrine of a religious denomination establishes as a religious duty that the poor should be helped or those in need relieved, such activities may also fall under this purpose. 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 includes the prevention or relief of sickness, disease or human suffering. This purpose can be pursued by complementary as well as conventional methods. Where activity concentrates on a particular form of diagnosis, treatment and cure, we may ask for independent evidence of impact so as to assess benefit. For example, where a body claims to cure a form of cancer if sufferers follow a specific diet, we would expect to see independent evidence that it does so, usually in the form of papers in reputable peer-reviewed journals. A lower standard of evidence may be acceptable where prevention or relief (and not diagnosis or cure) of sickness or suffering is the stated charitable purpose.

**e. The saving of lives.**

This includes a range of activity directed towards saving people whose lives are in danger and protecting life. Activities in pursuit of this purpose might include the provision of rescue services or training in first aid or other life saving techniques.

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**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 is focused on benefit to the community (rather than the individual) in two main areas:

- (i) the development and teaching of civic values; the promotion or protection of the rights of the citizen; the encouragement of voluntary activity and increasing the involvement of individuals in community activity; helping voluntary organisations, charities and social enterprises to build up their skills.
- (ii) the regeneration of communities in a particular area of operation by the maintenance or improvement of the physical, social and economic infrastructure and by assisting people who are at a disadvantage because of their social and economic circumstances.

**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. Benefit may be provided by the provision of arts facilities and encouraging high standards in the arts, for instance by bodies encouraging the playing or appreciation of a particular type of music, arts festivals or bodies aiming to improve facilities for the arts, such as theatres or concert venues.

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. Where a body aims to provide benefit by preserving a building or site, we may require some independent evidence (such as listing by Historic Scotland or some other authority) that heritage benefit would result from the activity.

In our view, culture can refer to a range of activities which are distinctive of a society or group within a society: for example, food, fashion, dancing, children's play or games. There is frequently an overlap with the other categories within this purpose, and the other purposes: for example, sports, beliefs, and recreation. 'Culture' shares with 'heritage' activities which are part of local or national history or tradition.

The advancement of science includes scientific research and charities connected with learned societies and institutions – examples would be societies promoting a particular area of scientific research or making grants to improve research facilities.

**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.

Bodies applying under this purpose must demonstrate that their activities provide benefit in terms of providing opportunities for public participation: this would generally mean that a wide range of participants (in terms of skill or ability level, physical condition, age, etc.) will

be catered for. Provision for elite or professional athletes is acceptable as part of such a range of provision (though it may raise issues of private benefit and appropriate use of assets).

The provision of facilities and activities related to many sports or other leisure pursuits (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 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. Activities under this purpose might include provision of a community centre or a youth club.

However, in order to satisfy the charity test, bodies with this purpose, like all other charities (and applicants) must also provide public benefit. It is important to note that where a body is not providing facilities or activities to the (male or female) public as a whole but only to a limited section of the public, that section must be defined in terms of need as set out in the Act. If this is the case then the body must be able to demonstrate that the benefit is being provided to that section of the public which is in need of it. An example would be a club providing recreational or sporting facilities for people with learning difficulties or an activity club for senior citizens.

**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 also includes the resolution of international conflicts and relieving the suffering, poverty and distress arising through conflict on a national or international scale by identifying the causes of the conflict and seeking to resolve such a conflict. The promotion of restorative justice and mediation or reconciliation between persons, organisations, authorities or groups may also fall within this purpose.

**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. Activities under this purpose might include schemes intended to bring together immigrants and existing residents in a particular area, or the provision of structures for inter-faith dialogue.

### **l. The promotion of equality and diversity.**

This covers the elimination of discrimination and promotion of diversity in society. Benefit might for example be provided under this purpose by advocacy or campaigning by or on behalf of, disabled people for better access to public facilities.

### **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 of wildlife in general, or the conservation of a specific plant species or habitat or area of land or water, including areas of natural beauty and scientific interest. In such cases, the assessment of public benefit may require independent evidence of the environmental benefit likely to derive from the body's activities. The more sustainable creation and use of energy and other resources may also provide benefit in terms of this purpose.

### **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, or drop-in centres). It will also be relevant to housing associations and Registered Social Landlords and to bodies aiming to relieve the effects of ill-health.

### **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. Activities might include the running of shelters for abandoned or maltreated animals or the provision of veterinary treatment.

### **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).**

For further discussion and examples of purposes recognised as analogous see point 4.1.

## **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 its existing or proposed constitution. The purposes are usually set out in a single clause or paragraph at the beginning of the constitution. The Act uses the word 'purposes', but many constitutions and commentators use 'objects', 'aims' or 'objectives' instead. In this guidance 'purposes' should be taken to include 'objects', 'aims' or 'objectives'. These will describe and identify the purpose for which a body has been set up. They will not list the body's day to day activities.

### What is a constitution?

The Act, in s.106, gives a full explanation of what is meant by the term ‘**constitution**’. This depends on the legal form of the body: in the case of a company it will be its memorandum and articles, in the case of a trust it will be the trust deed; in other cases the constitution may be a Royal Charter or an Act of Parliament; or more generally it will be the instrument which establishes a body and states its purposes.

In some older charities or bodies with complex histories the constitution may in effect be formed of a number of related documents, read together.

It is not necessary (or even always desirable) for a constitution to use the exact phrasing from the Act to describe what a body’s purposes are. Sometimes the language used may be quite different. If so, it must allow us to make a clear and direct inference, on the basis of the constitution itself, about how the purposes of the body relate to the headings in the Act.

In drawing up constitutions for bodies intended to be charities a balance needs to be achieved: on the one hand purposes as set out in the constitution need to reflect the overall aims of the body specifically and accurately enough to give adequate guidance to present and future trustees, beneficiaries and donors as to the range and limits of the body’s activity; on the other hand they must allow sufficient flexibility to support the development of the body’s activities in line with these overall aims.

A constitution should give as exact a reflection of the purpose of the individual body as possible. For example, ‘to promote and ensure the provision of services for mediation and conciliation between victims of crime and offenders’ is a more exact and meaningful purpose than the broader ‘to advance reconciliation and conflict resolution’.

If the organisation is to benefit a particular section of the public rather than the public as a whole, then the statement of purposes in the constitution should make this clear. The same is true if the benefits of the organisation are to be confined to a particular geographical area.

Where the statement of purposes is drafted purely in terms of intended activities, it may cause the body to fail the charity test if it is not clear which charitable purpose is intended. This may be the case where:

- a charitable purpose cannot be clearly and unambiguously inferred
- the activity stated could equally well be undertaken for non-charitable purposes.

When this is the position we may require the charity or applicant to change the wording to make sure that the relationship to a charitable purpose is made clear. Charitable purposes will appear on the Register for public reference, and if a charity wishes to change its purposes it must obtain OSCR’s consent before it does so.

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A charity's activities must be in furtherance of the purposes as set out in its constitution. It is a duty of charity trustees to ensure that the charity acts in a manner which is consistent with its purposes (s.66(1)(a) of the Act). If, at the application stage or at Rolling Review, 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. Furthermore, a body's constitution will itself generally require that the body's assets are used only for the charitable purposes set out in its constitution.

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. There is no restriction in the Act on the number of charitable purposes a body may have, but good practice suggests that the number should be limited so as to allow charity trustees to focus on a charity's main purposes.

### 4.1 Analogous purposes

By including as a charitable purpose any other purpose that may reasonably be regarded as analogous to any of the listed charitable purposes, the Act provides the necessary flexibility to allow charitable purposes to evolve as society changes. Section 7(2) (p) of the Act, by specifying that a relevant purpose must be analogous to one of the purposes (a-o) ensures that this flexibility is balanced by certainty and stability in the development of charitable purposes.

OSCR considers that a purpose might be recognised as analogous to one or more of the existing purposes in the Act and therefore as a charitable purpose when:

- a) it combines aspects of established charitable purposes into a distinctive and coherent whole reflecting current social contexts and necessities
- b) it includes or resembles certain aspects of existing purposes (a)-(o), but also includes novel or differing aspects
- c) it becomes appropriate in a changed social or practical context to consider as a free-standing purpose something previously considered as an activity in furtherance of an existing charitable purpose.

### Examples of analogous purposes

A number of purposes have already been recognised as analogous and therefore charitable, for example:

- The Act specifically mentions, in s.7(2)(p) the **advancement of any philosophical belief** (whether or not involving belief in a god) as being analogous to the advancement of religion. To be considered as analogous here the belief to be advanced must relate to a weighty and substantial aspect of human life and behaviour. It should have identifiable formal content that relates the nature of human life and the world to morality and values. It must be more than a deeply held feeling or opinion and must have a high level of cogency, coherence, seriousness and importance. The advancement of more narrowly drawn concepts or ideas may possibly constitute charitable purposes in terms of the advancement of education or culture.
- The **relief of unemployment**, particularly among residents of the operating area, in such ways as may be thought fit, including assistance to find employment, is considered to be analogous to the relief of poverty.
- Purposes involving **increasing or improving the efficiency of the emergency services** are considered to be analogous to the advancement of citizenship.

## 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:

- its constitution allows distribution or use of its property for a purpose which is not charitable
- its constitution expressly permits Ministers to control or direct its activities
- it is a political party or if one of its purposes is to advance a political party.

### 5.1 Distribution or use of property

Section 7(4)(a) of the 2005 Act states that 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, if a body's constitution says that, should it be 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, then that body cannot be a charity. Equally, if a body's 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 body's members, or be distributed among the charity trustees, it cannot be a charity.

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The Act does not require that a body's constitution must state that its property can, on winding-up, only be transferred to a charity registered in Scotland: the requirement is that it may only be used for charitable purposes. A number of other scenarios may be acceptable as well as transfer of assets to a charity registered in Scotland, for instance:

- a winding-up clause may provide that on winding-up the property should go to its (English) parent or sister organisation, provided that that organisation's purposes are charitable in terms of the Act
- a winding-up clause may provide 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.

Where the assets upon winding up are transferred to a body which is not a charity or does not have exclusively charitable purposes we will seek a high level of assurance that the assets will be and will continue to be used only for charitable purposes.

More generally, to comply with s.7(4)(a) it is vital that any definition or interpretation clauses in a body's constitution do not allow any part of it to be interpreted so as to allow the body's assets to be used for purposes which are not charitable under the Charities and Trustee Investment (Scotland) Act 2005. Issues can arise here because of the differences between the Act and English charity law and between the Act and UK tax law.

This often happens when an existing charity or applicant body has chosen to include a definition or interpretation clause in relation to the terms 'charitable' or 'charitable purpose' or 'charity' in its constitution. Where the definition of 'charitable' or 'charitable purpose' is not in terms of the 2005 Act, and where the constitution elsewhere allows property to be distributed 'for any other charitable purpose' or to 'another charitable body', this may prevent the body passing the charity test.

### Examples of problematic definitions of 'charitable' or 'charity'

- A body's constitution contains an overall provision defining 'charitable' or 'charitable purposes' solely in terms of the Income and Corporation Taxes Act 1988 and the constitution allows the distribution of its assets, on winding-up, for 'any other charitable purpose'.  
In UK tax law 'charitable purposes' are defined following the law of England and Wales, which differs in a number of respects from Scots law. Where a charity's constitution defines 'charitable' or 'charitable purposes' in this way, with no reference to the 2005 Act, then this allows the possibility of the charity's property being applied for purposes that, while charitable under tax (and English) law, are not charitable in terms of the 2005 Act.
- The constitution of a body established under the law of England and Wales allows the distribution of its assets, on wind-up, to 'any other charitable body'.  
Again, because 'charitable body' here will be interpreted in terms of England and Wales law, this allows the possibility of the charity's property being applied for purposes that are not charitable in terms of the 2005 Act because of the differences between the two jurisdictions.

We are aware that, while charities and bodies applying for charitable status must pass the charity test, they will also generally wish to qualify for recognition as charities for tax purposes. To achieve this, definitions of ‘charitable’ or ‘charitable purposes’ will need to ensure that the body’s assets can only be used for purposes which are charitable in terms both of the 2005 Act and Tax law. OSCR and HMRC will work with applicants and charities to help them achieve this. For further details see the OSCR briefing note on ‘Charitable’ and ‘Charitable purposes’ on the OSCR website and our Joint Statement *Defining the phrase ‘charitable purpose’ or the word ‘charitable’ in the constitutions of Scottish Charities* with HMRC available on the OSCR website [www.oscr.org.uk](http://www.oscr.org.uk).

## 5.2 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 in Scotland. ‘Direct’ in this context we interpret as an explicit power of direction by a Minister. We interpret ‘control’ as meaning the ability to intervene actively in a body’s activities in order to ensure that these activities are carried out as the controller (in this case a Minister) wishes.

From our experience to date we have identified three distinct ways in which Ministers are permitted to direct or control the activities of a body. To be an issue for charitable status these must be expressly provided for in the body’s constitution:

- by direct mechanisms – the constitution allows the Minister to make directions or act directly in some other way
- by making regulations or orders – the constitution (usually an enactment) gives the Minister authority to make regulations or orders which then require the body to do certain things
- by consent or approval – the constitution requires charity trustees to obtain the Minister’s consent or approval for certain actions.

Where a constitution contains such mechanisms, we will consider whether, if they were to be used, the Minister would exercise substantive control of the body, in a sense that would result in the loss or undermining of its continuing independence. This depends on a number of factors, such as the relative importance to the body’s overall activities of what is being controlled, whether the Minister’s role is reactive or proactive, and whether their ability to control is absolute or can only be exercised in certain defined circumstances. We look at the constitution as a whole, taking into account the cumulative effect of individual provisions in undermining independence.

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### Examples of Ministerial powers which indicate direction or control

- A body's constitution is an Act of Parliament which provides that a Secretary of State may make directions as to the body's activities, and provides that the body is required to follow these directions
- A community body's constitution provides that before they make any change to it, the consent of a Scottish Minister must be sought
- A charitable company's founding documents give Ministers the unqualified power to dismiss its charity trustees (on the other hand power for a Minister to appoint trustees would not in itself indicate control).

For further details see our *Policy Statement on Ministerial Powers*, available on the OSCR website [www.oscr.org.uk](http://www.oscr.org.uk)

This part of the charity test applies only to powers for Scottish Ministers or Ministers of the Crown. It does not mention or include powers of direction or control by local authorities or any other type of third party. It is therefore not a condition of passing the charity test that charities must be independent of local authorities, other charities or other bodies.

However, although this is not a part of the charity test, all charity trustees or applicants need to be alert to the issue of effective operational independence. The 2005 Act is explicit about the duties of charity trustees and the need to guard against conflicts of interest (s.66). This may be an issue where a charity has charity trustees who are connected with another body, for instance where some of its charity trustees are also local councillors or council officials or are charity trustees of another charity. In such a case, the charity's constitutional arrangements and operational procedures need to ensure that decisions involving a possible conflict of the interests (between the charity and the other body to which such charity trustees owe a duty) are taken in the best interests of the charity itself. For further details, see our *Guidance for Charity Trustees*, available on the OSCR website [www.oscr.org.uk](http://www.oscr.org.uk)

### 5.3 Party political purposes

Even if it appears to have charitable purposes and provide public benefit, a body cannot be a charity if the organisation is, or if one of its purposes is to advance, a political party (section 7(4)(c) of the 2005 Act).

However, a charity would be able to engage in advocacy, campaigning or other political activity in order to further its charitable purposes without jeopardising its charitable status. The Scottish charity test therefore does not prevent charities from campaigning or lobbying to change the law or the policy of public bodies where this is in furtherance of their charitable purposes. Nor would it prevent such campaigning being a charity's main activity.

## 6. Public benefit – an overview

The second part of the charity test requires (in section 7 (1) (b) of the 2005 Act) that a body ‘provides (or, in the case of an applicant provides or 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 a body provides public benefit in Scotland. Public benefit may be provided in Scotland or elsewhere, for example when overseas aid organisations provide benefit mainly or exclusively abroad, or when an organisation has operations throughout the UK.

The Act 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. Section 8 says:

### 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.

We will make our assessment of public benefit on the basis of a body’s (intended) activities and will look at whether in practice a body provides (or is likely to provide) public benefit as a result of the activities carried out in furtherance of its charitable purposes.

We expect applicants and charities to be able to identify and describe the benefit that they provide or intend to provide. We recognise that the nature of the benefit can vary enormously from one organisation to another in terms of its scale and nature, and how immediate or visible the impact or result of any benefit is.

In essence OSCR is required to make a judgement on the whole picture of public benefit in the body being looked at. In doing so we will look at the balance of public benefit versus any private benefit or any disbenefit, and take into account a judgement on whether any unduly restrictive conditions apply in obtaining the benefit that is provided. These concepts are explained in point 7.

## 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 of 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 beneficiary group, in many cases to the public generally. In most cases a charity will provide both direct and indirect benefits as a result of its activities, but to different degrees depending on individual circumstances.

#### Examples of indirect benefit

- bodies promoting literacy and health awareness among women in developing countries: as well as directly benefiting the women concerned, there is indirect benefit to the public at large in those societies by improving public, especially child, health
- religious bodies: in addition to the direct benefits to those attending public worship, there are wider benefits to society in terms of increased social solidarity or relief to those in need
- medical or similar professional bodies providing training and regulating professional standards: there are direct benefits to the individuals receiving training, but also wider benefits to society from raising and maintaining standards of care.

For OSCR to take a benefit into account under the charity test, there needs to be a link between a body's charitable purposes, its activities in furtherance of those purposes and the benefit in question. 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, 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 church's charitable purpose is to advance the Christian faith. Similarly, if a charity whose purpose is the advancement of animal welfare provides courses which allow people suffering from mental ill-health to increase their well-being through contact with animals, such activity would not be relevant in terms of public benefit. There needs to be a link between the activities and the reason the charity was set up and recognised as having charitable purposes.

That does not mean however that, if a body provides some benefit that is not related to its stated charitable purposes, then it will fail the public benefit part of the charity test. We will consider the situation as a whole – what is required is that the overall picture is predominantly one of providing public benefit through activity in furtherance of the charitable purposes. Bodies will need to consider whether they are working within their constitutional powers in providing such activities – see point 4.

In assessing public benefit (or any other aspect of the charity test) OSCR will take account of evidence from all sources, including evidence in the public domain and from members of the public or other organisations. However, it is important to note that the Act does not provide for a formal third party right of objection in regard to applications for charitable status or the review of bodies on the Register.

## 7.2 Providing benefit

The Act does not set a minimum amount of benefit that needs to be provided before there can be said to be public benefit. OSCR does not operate an absolute volume or impact threshold, nor is it part of the charity test assessment to make a judgement on the effectiveness or efficiency of the charity in providing benefit. Given the Scottish context, with many charities operating on a small scale in small communities, setting such a minimum would not be reasonable or appropriate.

It is only in the case of applicants that s.7 of the Act allows us to look at the intention to provide public benefit: we will look at the benefit which the public is likely to gain as a consequence of this intention. To assess this we look at evidence of activities the applicants plan to carry out (if they do not already do so). Certain types and levels of activity will of their nature require less evidence to demonstrate public benefit than others, and we will be proportionate and targeted in the level of evidence we ask for.

Existing charities on the other hand must in some way actively provide public benefit, and not simply intend to provide it. 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. However, we expect these to last for a limited time only and expect that charity trustees will explain them in their Annual Report, which needs to be prepared every year and submitted to OSCR.

### Examples of 'apparent inactivity'

- 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 the reasons for it 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 a 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 always 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 grant giving policy to be clearly stated in a body's application for status or 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 a direction or, ultimately, to remove the body from the Register (s.30) on the basis that the body has failed the charity test.

We also acknowledge that a charity may not necessarily provide public benefit in furtherance of all its purposes at any one time, but to pass the charity test it must be providing benefit in furtherance of at least one of the purposes stated in its constitution.

### 7.3 Defining 'the public'

We will consider the extent to which the public at large, or a 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 may benefit are justifiable and reasonable. What is justifiable and reasonable will depend on the nature of the body's charitable purpose and the nature of any limits on the beneficiaries to be served, and how these limits are operated. For further discussion, see point 7.6, Unduly restrictive conditions.

## 7.4 Private benefit

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
- the extent of this benefit
- how this private benefit relates to any public benefit provided.

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 body's purposes. An example would be where an individual benefits from medical care that is given by a charity set up to relieve illness.

Where benefit to individuals is not in furtherance of the body's purposes, any private benefit should be necessary and/or incidental to the pursuit of the charity's purposes:

- by **necessary**, we mean that the public benefit which the charity provides (or intends to provide) cannot realistically be provided without incurring the degree and kind of private benefit involved
- by **incidental**, we mean that the private benefit arises as a secondary consequence of activity producing benefit to the public and is not an end in itself.

For example, a charity might pay salaries to its staff. This is a private benefit to the staff, but one which is necessary to the pursuit of the charity's purpose where the charity cannot deliver benefit on a purely voluntary basis. It is incidental to the pursuit of the charity's purpose, where the payment of staff is a by-product of the provision of benefit and not a purpose of the charity in itself.

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

It is worth looking specifically at the way in which private benefit applies to membership bodies. It is, in principle, acceptable for charities to adopt membership structures, but 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 and/or incidental to the purpose of the charity. Benefits that are inconsequential or of little measurable value will not usually cause a problem.

It may, however, also be that the members of a body are at the same time the main beneficiaries of the body (for example guides, scouts or similar groups). Where a body's benefit is directed at its membership then we will need to consider how far there is public access to such membership, and whether the membership criteria are justifiable and reasonable given the nature of the charitable purpose. Bodies which exist primarily to

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benefit their members and which have a closed or unduly restricted membership will not be considered as providing public benefit.

We recognise that membership bodies 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's *Guidance for Charity Trustees*, available on the OSCR website [www.oscr.org.uk](http://www.oscr.org.uk)).

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

### More examples of possible private benefit

- *A potential heritage charity plans to use its funds to restore an historic mill belonging to a private individual – the owner will benefit from the value added to his property from this activity.*

Here we would look to be reassured that there were some firm arrangements to ensure that the private benefit to the owners is removed or minimised, or outweighed by public benefit from continued access and use for charitable purposes. Examples of these would be a firm undertaking to transfer ownership to the charity or for it to take a long-term lease of the property. Where this is not possible, and the private benefit is substantial, the body may fail the charity test.

- *A membership based organisation set up to promote the conservation of wildlife gives some specific benefits to its members such as free or reduced price publications.*

Where such private benefit is incidental to the provision of the wider public benefit resulting from the conservation activities supported by the members it may be acceptable.

- *A university undertakes research activity for corporate or commercial sponsors. The results are used to gain commercial advantage for the sponsors and are not publicly disseminated.*

Where the private benefit which results is at a level where it is clearly secondary to and outweighed by the public benefit from the rest of the university's activity we may consider the private benefit to be incidental.

- *The careers of individual members of a professional body benefit from its activities in providing training to them and improving the standards and status of the profession.*

Here, if the body can demonstrate that the main thrust of its activities is outwards, towards the indirect benefit to the public as a whole through the maintenance of high professional standards and practice, then the private benefit may be regarded as necessary and incidental to providing the benefit to the wider public.

## 7.5 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 the opposite of benefit. It is therefore more than the mere absence of benefit, and our view is that it is equivalent to detriment or harm.

We need to consider whether a (prospective) charity, in pursuing its purposes, causes disbenefit to the public, and the extent to which that is the case compared to any benefit that is provided. The fact that some disbenefit results from the activities of the charity does not in itself mean that the charity test is not met. If, on the other hand, taking into account all the (prospective) charity does, the disbenefit to the public outweighs the benefits, then public benefit will not be provided. This may also be the case if the disbenefit is of such a serious nature as to negate the benefit 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 can vary in nature, scale and the immediacy or visibility of the impact or result. Again, as with benefit, it should be possible to identify and describe the disbenefit caused. To be taken into account, the disbenefit should affect the public at large or a relevant section of the public.

Our assessment must relate to the activities of the individual organisation, not those of similar organisations as a group, since the charity test applies to individual organisations, not groups of them. We do not take into account the perceived general advantages or disadvantages of a type of organisation (for instance the general arguments for or against religious bodies or fee-paying schools).

Again, since we are looking at the benefit or disbenefit produced by a body in exercising its functions, we do not take into account the perceived social or economic advantages or disadvantages of these functions being undertaken by a charity, rather than some other type of body. For instance we would not take into account the perceived benefit or disbenefit which may occur by reason of a change from private or local authority provision of particular activities to provision of them by a charity. The **change** in provision or delivery vehicle is not an issue for the charity test. Rather, it requires us to assess whether the body being assessed for charitable status can undertake the activities in furtherance of its purposes, and whether it will provide public benefit by doing so.

Many of the everyday actions of organisations (and individuals) may cause a degree of disbenefit to others, either directly or indirectly. This fact should not unnecessarily stifle the operations of charities. Where any disbenefit caused stems from reasonable and necessary actions in connection with the (prospective) charity’s purpose and is the inevitable and generally accepted result of such reasonable actions in the society in which they take place, then such disbenefit may be largely disregarded.

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### Examples of how disbenefit is considered

- *A body set up to advance mental health includes among its activities the provision of an unorthodox therapy, known to have adverse effects on some individuals.*

We would have to consider whether the disbenefit from this activity (from possible distress to vulnerable individuals) would be likely to outweigh any benefit, and we would need to look at this disbenefit in the context of the likely benefit from the body's wider activities.

- *A body set up to advance environmental protection wants to construct a wind farm in a rural area.*

We may be aware that a householder close to the site is concerned that it may reduce the value of their property but it is unlikely that this disbenefit, since it is effectively private to them, can be said to be a disbenefit to the public. On the other hand, we would take into account, usually in the form of any decision from the statutory planning system, the likely wider environmental impact of the wind farm on the local area and weigh this against the likely benefit to the environment from reduced reliance on fossil fuels.

- *A body intends to help reintroduce to a particular area a plant or animal formerly native there.*

We would need to consider independent evidence of benefit to the public through the enhancement of the local ecosystem against any evidence of possible damage to the economic life of the community through damage to farming or sporting interests.

- *An organisation is set up to advance the position of a particular set of beliefs in political and public life. Its activities are lobbying and campaigning for changes in public policy and the law to entrench the position of the group holding these beliefs.*

Where there was evidence of any demonstrable harm likely to be caused to members of other groupings or to the general public through these activities we would need to weigh these against the benefit intended.

While OSCR will take appropriate account of public opinion, public opinion cannot be the final arbiter of benefit or disbenefit. Public opinion can be both deeply divided on an issue and liable to change, and charities may often be working in controversial areas or undertake activities which are not popular or well understood. Indeed, part of a body's activities in furtherance of its purposes may be to change public sentiment on an issue (such as majority attitudes to minority groups). The simple fact that some individuals or groups in society may disagree with aspects of a charity's activities does not in itself mean that disbenefit is caused: there must be evidence of actual or likely detriment or harm.

## 7.6 Unduly restrictive conditions

Finally, we need to consider whether any condition on obtaining the benefit (including the charging of any fee) is unduly restrictive – that is, whether it is excessively restrictive, or restrictive in contradiction of general moral or legal standards, or is unreasonable, or is not justifiable. The existence of a restrictive condition in itself can be consistent with providing public benefit and passing the charity test: to become an issue, the restriction must be **undue**.

### *7.6 (a) Restricted numbers of potential beneficiaries*

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, these will not constitute undue restrictions.

If a body'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, a body 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 the relevant section of the public to apply for them. A different example may be where a body 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.

In some cases direct benefit to a very small section of the public indirectly benefits the public as a whole as well. For example, a body working to conduct research into a very rare disease and to relieve the suffering it causes will provide benefit to the public. While comparatively few sufferers will benefit directly at any one time, more will be likely to benefit if the body's activities continue. There may also be indirect benefit to sufferers' relations, and, through the wider benefits of the research, to the general state of medical knowledge.

### *7.6 (b) Unduly restrictive conditions in general*

Restrictive conditions can take a number of forms: bodies may wish to restrict access to the benefit they provide on grounds perhaps of age or sexual orientation. They may plan to restrict access to benefit on the basis of a means test or some other criteria related to financial circumstances. Benefits may be available only to those diagnosed as suffering from a particular condition, or who live in the area of operation. From other bodies benefit may only be available to those who pay a charge or fee (for more detail on this, see point 7.6 (d)).

Where a restriction is justifiable or reasonable given the nature of the charitable purpose(s) being pursued then a restriction is unlikely to be undue. Where the restriction has no relevance to the charitable purpose, and is not otherwise justifiable, it may constitute an undue restriction.

An example of an undue restriction would be a sports club where access to benefit is

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dependent on being a member, and where membership is conditional on being proposed and seconded by existing members and then on an application being scrutinised by the charity trustees, no explanation being given for acceptance or rejection. Such a restriction on access has no relevance to charitable purpose and is unlikely to be justifiable on other grounds.

Where those who will benefit from a body's activities are restricted by reference to a personal connection, such as a family relationship or a single common employer, this would likewise constitute an unreasonably closed and restricted section of the public and such a body would normally fail the charity test. This would also be true of bodies set up to benefit named beneficiaries.

Where a body is set up to provide or maintain particular facilities for the benefit of the public, any restriction on public access (such as limited opening hours, limitations on what facilities 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 does not in itself mean that the body does not provide public benefit. However, the restrictions may be undue when they are so extensive as to effectively prevent access to the benefit for the majority of potential or intended beneficiaries, and no alternatives are in place or adjustments have been made.

### 7.6 (c) *External comparators*

One of OSCR's strategic objectives is to reduce the burden of regulation, with an emphasis on collaborating with other regulatory authorities. It is therefore reasonable for us to consider whether a particular restrictive condition has already been addressed. So, where Parliament, the courts, regulators or public bodies have already considered a possible restriction in a way that establishes a comparator or guideline that is relevant to public benefit assessment, OSCR will give considerable weight to this.

For instance, 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 relation to this, bodies should again bear in mind that there should be a rational link between any restriction on who can benefit and the charitable purpose they intend to further. Where conditions or restrictions on access to 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 unduly restrictive.

Another example of our use of an external comparator would be in the case of a housing association seeking charitable status and having an allocations policy setting out the criteria on which it would assess applications for accommodation. Here, we would consider how the policy relates to the criteria set by regulators in the housing sector.

Where a comparator is not based on legislation, non-compliance will not automatically mean that a condition is too restrictive – rather, we will need to examine carefully any reasons why a body's conditions on access diverge from the comparator. We will also take into account the purpose for which any comparator has been established and the context in which this was done, to assess the comparator's relevance to consideration of public benefit.

### 7.6 (d) Fees and charges as restrictive conditions

The Act specifically includes charges or fees as a possible unduly restrictive condition (s.8(2)(b)). We need to bear in mind that the Act, in referring to conditions being **unduly** restrictive, accepts that there may be a certain level of restriction. The fact that a (prospective) charity provides benefits that will be charged for and will be provided mainly to people who can afford and choose to pay the charges does not necessarily mean that the body does not provide public benefit.

Fees and charges are levied by a wide range of charities and applicant bodies, and can take a number of forms, some more obvious than others. So, charitable housing associations charge their tenants rent; some medical charities charge individuals or organisations for the provision of medical procedures; care homes charge for accommodation and different levels of care; theatre or music groups charge for access to performances; some educational charities charge for tuition or other services; and playgroups and after school clubs charge parents for their children's attendance. There is wide variation in the level and structure of these charges, the context in which they are set and levied, and in the relationship between payment and access by individual beneficiaries. The principles we use in assessing whether fees and charges amount to undue restriction must be capable of being applied across this whole range of bodies and contexts.

As an overall approach, we assess whether a fee or charge constitutes an unduly restrictive condition by focusing on access to the benefit a charity provides. We look at whether and to what extent in the context of the cost of providing the benefits, access may be restricted, how the charity responds to mitigate the impact of the financial restriction on access, and any other factors which mitigate this. The following principles then guide our decision making:

- *Transparency is important, whatever the scale of fees* – the charity should be able to demonstrate that its fee structure and arrangements to facilitate access are well publicised.
- *There are otherwise no absolute requirements.* It is for the charity to decide in what way it can best ensure that any fees or charges do not unduly restrict access to its benefits, but the overall decision on whether there is public benefit is for OSCR to make.
- *Proportionality is a factor in assessment* – in the case of small or insignificant fees less evidence is generally required to assess whether these constitute an undue restriction (though where benefit depends on a small fee regularly paid over a long period, the cumulative result of such fees will be considered). The greater any fee, the more evidence may be needed, and the more important any measures on the part of the charity or others to mitigate the impact of the fee become.
- *The scale of any fee will be weighed against the full scope of the benefit(s) provided – those that are being charged for as well as any that are not being charged for.* This means that we will take into account any other benefits the body provides in furtherance of its charitable purposes, for which it makes no charge.
- *Where a fee is charged which may affect the access to a benefit, we expect some kind of facilitated access or other mitigation to be in place.* We will assess the cumulative impact of any support to help potential beneficiaries to access charged for

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benefit (such as discounts, bursaries and fee waivers). We will take account of the extent to which any facilitated access makes provision for people with a wide range of incomes, including low incomes.

Forms of facilitated access which are clearly linked to the financial situation of potential beneficiaries (for instance through means-testing) are likely to have the greatest impact in addressing undue restriction in this context. Other types of facilitated access, based on specific needs or disadvantages of potential beneficiaries (such as local authority funding for specialised types of schooling or care) will also have significant impact depending on the purposes of the body or the context in which it operates. There is no requirement for the profile of beneficiaries of any charity to reflect the profile of the population as a whole, or the profile of the local population.

Facilitated access arrangements, such as support to pay any fees or charges, which come from a body that is not a charity or is not connected with the charity can and do in practice facilitate access to the benefit a charity provides. What matters is that the source of support is reliable, and (most importantly) how much impact the arrangements have on opening up access. Where the charity itself funds the support arrangements we will recognise this as a positive contribution to its provision of public benefit.

Purely personal arrangements, such as support from extended family, or arrangements that result from a personal connection, such as a family or employment relationship, would not normally be regarded as opening up access to the benefit.

- *The cost of providing the benefit that is being charged for is relevant to assessing whether any fee or charge is unduly restrictive* – some benefits are more expensive to provide than others and we recognise that charities must be able to cover the cost of providing benefit. Keeping fees charged to individual beneficiaries low (in relation to the average cost of providing a similar service) by covering the full cost in part from other sources (such as donations) can in some circumstances be an appropriate means of ensuring that fees are not unduly restrictive, though in assessing this regard will still be had to all principles. We will take into account conditions attached to receipt of income from external sources, such as the requirement for matched funding, and the way these conditions interact with fee levels to facilitate access.

### Examples of how we assess undue restriction

- *An after-school club set up to provide education and recreation for school-age children whose parents are working makes a daily charge of a few pounds per child.*

Parents putting their children into the club are likely to do so on a regular basis, so that, while the daily charge may seem insignificant, the cumulative charge over a school term or year may be in the order of hundreds or thousands of pounds. We would therefore look at whether the cumulative charge for a typical pattern of usage would be likely unduly to restrict children's access to the benefit provided.

- *A group established to promote education in music by putting on two chamber music concerts per year makes a charge of £5.00 for those attending.*

Where the charges are not out of line with the average for the activity and the likely costs we will be unlikely to see such charges as unduly restrictive.

- *A residential care home for the elderly charges several hundred pounds per week per resident, depending on the level of care required, making annual charges very significant. The income from fees generally just covers running costs. Almost all residents have their fees paid as access is facilitated by means-tested, needs-based arrangements guaranteed by the local authority, which are based in statute.*

The local authority in effect sets out an external comparator in terms of what level of fee it considers reasonable in its area to pay for the services provided. All of these arrangements are published on the organisation's website and literature. In such a case, though the fees charged are substantial, we would be likely to conclude that there is no undue restriction on access given the context of the cost of provision, the relationship to external comparators and the well-publicised and extensive provisions for facilitated access.

- *A professional body for a medical specialism charges substantial annual fees for its members, and also charges them and others for courses and for running professional examinations. There are concessionary levels of fees for student and probationer members. Members must also be qualified in the field, or studying for a relevant qualification. Most of the body's activity is devoted to education in the specialism through publishing a learned journal and maintaining funding research, and to maintaining professional standards through monitoring and disciplinary activities.*

In such a case, we would be likely to look at the charges to members in the context of the indirect benefit provided free of charge to the wider public through the improvement and maintenance of standards of care in the field. The qualification requirement we would be likely to regard as justifiable and reasonable in the light of the body's purpose.

### 7.7 Deciding on public benefit

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

In making our assessment we must also have regard to the regulatory principles set out in s.1(9) of the Act, that is to say the need for regulatory activities to be:

- proportionate
- consistent
- transparent
- targeted only at cases where action is needed.

We will also have regard to the need to be:

- fair
- independent
- well-informed.

While it is of course vital that the assessment process is methodical, it is not and should not be a mechanistic 'box-ticking' process. The issue of public benefit is straightforward in the majority of cases, but there are others where the assessment is complex in a number of respects:

- difficulty in assessing individual elements of the public benefit consideration set out in points 7.1-7.6
- a complex relationship between these differing elements
- the need to balance all of them to come to an overall view as to whether public benefit is provided.

An example would be the consideration of one of the examples in point 7.6, the professional body. Here, there are issues of private benefit (is the benefit to the membership only, and is this public benefit?) and of possible undue restriction (do the fees charged to members unduly restrict access to the benefit provided?). These are complex issues in themselves, but in fact the overall public benefit assessment depends on their interaction. If the benefit were primarily to the membership, then there would probably be excessive private benefit. Our view is that the main benefit provided is in fact the indirect benefit to the public at large. The significance of the fees charged to members is therefore reduced, since the main (indirect) benefit to the wider public is provided free of charge. Overall, the body provides public benefit, but if these two factors were to interact in a different way, the outcome might be different.

The Act in s.8 does not provide or even imply any relative weighting among the elements we need to 'have regard to'; no single one of these elements takes precedence over or has

more weight than any other. Their relative importance may in fact vary according to the type or structure of the body being assessed, and according to charitable purpose (and this has been indicated at appropriate points in section 3 above). Such issues will become clearer and more predictable as case law under the 2005 Act builds up, and we will continue to issue specific guidance.

## **8. How to demonstrate public benefit**

OSCR will assess whether a body provides or intends to provide public benefit on the basis of its (intended) activities. We will therefore need to have a picture of the (intended) activities, which generally will not be apparent 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 business plans, 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 already has 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 does 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 body would not meet the public benefit requirement or a different aspect of the charity test, we will generally 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 body cannot be registered because it will not qualify as a charity. Where a body fails the charity test a refusal notice will be issued and the review and appeal process will apply – see point 8.3. Where a body passes the test it will be entered in the Scottish Charity Register and a charity number will be issued.

### **8.2 Review of existing charities**

Under the Act, OSCR is under a duty to review entries in the Register from time to time, as well as to remove from the Register a charity that no longer meets the charity test. This requirement forms the basis for OSCR's Rolling Review of existing charities. As part of this process we are prioritising charities that present specific risk or uncertainty in relation to the

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charity test. Where it appears to OSCR that an individual charity is not providing public benefit, or in any other way does 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, direct the charity to revise its activities (and possibly its stated purposes) so that it can demonstrate it provides public benefit. Similarly, if there are issues with a charity's purposes or other constitutional provisions, we may direct them to amend these. Such Directions will include a realistic timescale for compliance, based on the nature of the action to be taken.

However, there may ultimately be cases where a charity simply cannot, or is unwilling to take the actions that would enable it to meet the requirements of the charity test. In these cases OSCR's regulatory intervention might include removing the organisation from the Scottish Charity Register and asking the court to approve a 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 charity test. Such decisions to remove a charity are subject to a review and appeal process (see point 8.3).

### 8.3 Reviews and Appeals

It is worth emphasising that the Act provides for a review and appeal process which applies to decisions to:

- Refuse charitable status to bodies which have applied for such status
- Direct a charity to take action to ensure that it will meet the charity test
- Remove charities from the Scottish Charity Register.

In these cases, the body may request OSCR to review the decision, providing the request is made within 21 days of the decision notice being issued. OSCR must complete the review within 21 days of receiving the request, and can confirm, vary, reverse or revoke its original decision.

If on review OSCR confirms the original decision and the body is unhappy with this, it can appeal the review decision to the Scottish Charity Appeals Panel, provided it does so within 28 days of the review decision. The Panel can confirm OSCR decisions, quash them and direct OSCR to take particular actions, or remit the decision to OSCR for reconsideration.

Decisions of the Scottish Charity Appeals Panel may be appealed to the Court of Session.

The review and appeal procedure applies also to decisions to remove charities from the Scottish Charity Register following Rolling Review. Where a decision notice is issued for removal, the charity will not be removed from the Register during the 21 day period during which a review may be requested. Where a review is requested, the charity will not be removed during the period while the review is being carried out. Where the decision to remove is confirmed, the charity will not be removed during the 28 day period during which an appeal to the Scottish Charity Appeals Panel may be requested, or during an appeal once requested.

