

CONSTITUTIONS OF BODIES ESTABLISHED UNDER ENGLISH LAW APPLYING FOR CHARITABLE STATUS IN SCOTLAND

OSCR BRIEFING

Introduction

OSCR has identified an issue in the drafting of the constitutions of a number of bodies that are charities in England and Wales, and which have applied to the Office of the Scottish Charity Regulator (OSCR) for charitable status in Scotland and entry on the Scottish Charity Register.

The wording used in the existing constitutions of some of these bodies is such that charitable status in Scotland cannot be granted, and these bodies cannot be entered in the Scottish Charity Register. Further, after 22nd February 2007, a body not entered in the Scottish Charity Register may not refer to itself as a 'charity' in Scotland without breaching Section 13 of the Charities and Trustee Investment (Scotland) Act 2005.

This briefing note sets out the issue in some detail; outlines key points for those bodies to consider; explains OSCR's position; and what action should be taken to resolve the situation.

The wording of constitutions and the Scottish charity test

The Charities and Trustee Investment (Scotland) Act 2005 requires that all bodies that wish to refer to themselves as charities and that have a significant presence in Scotland are entered in the Scottish Charity Register. For a body to be entered in the Scottish Charity Register it must meet the charity test set out in the 2005 Act.

Section 7 of the 2005 Act defines the charity test that OSCR must apply in considering all applications for charitable status. Section 7 (2) lists the charitable purposes. In addition, Section 7 (4) states:

'(4) A body ... does not meet the charity test if –

- (a) its constitution allows it to distribute or otherwise apply any of its property (on being wound up or at any other time) for a purpose which is not a charitable purpose.'

Having examined the constitutions (or memoranda and articles of association, trust deeds or other types of governing documents) accompanying applications from bodies in England and Wales, OSCR has identified a number where the wording used in the constitution means that the body does not meet the Scottish charity test.

The issues arise mostly in relation to the wording of objects and dissolution clauses. If a body has specific objects such as the relief of poverty or advancement of education there may well be no problem. The difficulty arises where instead or in addition to specific purposes an objects clause contains a reference to "other charitable purposes". Also, or alternatively, a dissolution clause may provide for a body's assets at wind-up to be used for 'some other charitable purpose'.

This causes a problem because the constitutions of bodies established under English/Welsh law need to be interpreted according to English/Welsh law. The terms 'charitable' and 'charitable purpose(s)' when used in the constitutions of bodies established under English/Welsh law therefore have the meaning these terms have in English/Welsh law. The definitions of what is 'charitable' and what is a 'charitable purpose', although very similar, are not identical in Scottish and English/Welsh law. OSCR needs to be satisfied that, before entering a body on the Scottish Charity Register, its constitution does not allow the property of the charity at any time to be used or distributed for purposes which are not charitable in *Scottish* law.

There is by no means a difficulty with the constitutions of all English charities that seek registration in Scotland. Whether there is a difficulty depends on the exact wording in the constitution.

The practical consequences

Where the constitution of a body, in this case an English or Welsh charity, does allow the use of its property for purposes which are not charitable in Scottish law, the body *must* amend its constitution to meet the requirements of the Charities and Trustee Investment (Scotland) Act 2005 before being granted charitable status in Scotland and being entered in the Scottish Charity Register.

In the vast majority of cases this should not involve extensive modification of governing documents. It may be, for example, that the body could insert a new clause into its constitution defining 'charitable' as stated in both English *and* Scottish law. OSCR and the Charity Commission have agreed model clauses that can be adopted for this purpose¹. However, it will ultimately be for the body and its legal advisers to consider what will be the most appropriate wording for its individual circumstances and to ensure that it is acceptable in both jurisdictions.

¹ The Charity Commission will also amend the guidance to its model governing documents to highlight the need for particular care to be taken when drafting the constitutions of bodies that intend to operate in Scotland.

OSCR's position on this issue

OSCR is a fair and proportionate Regulator, but principles are paramount. The legislation in Scotland was designed to meet the needs of Scottish charities and was fully considered by the Scottish Parliament. The Act is the express will of Scotland's public representatives and legal opinion is that a body affected by this issue must amend its constitution if it wishes to achieve charitable status in Scotland.

Agreed model clauses

OSCR has agreed with the Charity Commission the wording for standard amendments which meet the requirements of the Scottish charity test and also concerns raised concerning the England and Wales regulatory situation.

For charities which operate in Scotland and which refer to general charitable purposes in their objects and dissolution clauses the following overriding provision should be added, ensuring that it applies throughout the constitution:

Throughout this [insert type of governing document eg trust deed] 'charitable' means charitable in accordance with the law of England and Wales provided that it will not include any purpose which is not charitable in accordance with section 7 of the Charities and Trustee Investment (Scotland) Act 2005.

For the avoidance of doubt, the system of law governing the constitution of the charity is the law of England and Wales.

An alternative overriding provision which might be sufficient where the actual objects met the charity test in Scottish legislation although the dissolution clause or other powers did not:

"Nothing in this [insert type of governing document eg trust deed] shall authorise an application of the property of the charity for purposes which are not charitable in accordance with section 7 of the Charities and Trustee Investment (Scotland) Act 2005."

Action to take

We recognise that this issue may cause some concern. The deadline of 22nd February 2007 has passed, meaning that bodies that are not entered on the Scottish Charity Register but that do have a significant presence in Scotland and referring to themselves as charities are, technically, in breach of section 13 of the 2005 Act². Where these organisations have submitted an application for registration to OSCR we will deal with the situation as follows:

² Section 13 and 14 of the Charities and Trustee Investment Scotland Act, read in conjunction with Section 99(3)(b) and the Charities and Trustee Investment (Scotland) Act 2005 (Commencement No.2) Order 2006

- i. Where the organisation can demonstrate that it already is in the process of amending its constitution within a reasonable timetable, we will take no immediate action in respect of the technical breach of section 13. We will make arrangements to monitor the position and expect to see progress and a resolution (i.e. an amended constitution allowing registration) within the stipulated timeframe.
- ii. If the organisation has not yet taken the decision to amend its constitution, we will seek a commitment from the charity trustees to adjust the constitution within a reasonable time frame. If we obtain the commitment of the charity trustees within a reasonable period then again we are content to take no immediate action. Again we will make arrangements to monitor the position and expect to see progress and a resolution within the stipulated timeframe.
- iii. If the organisation declines to amend its constitution, then we have no option but to (a) refuse entry in the Scottish Charity Register and (b) regard any representation by the body as a 'charity' as a clear and continuing breach of section 13. We would move to take appropriate action under the powers available in section 31 and section 34 of the 2005 Act.
- iv. Where a 'cross border' organisation, that is required to seek entry in the Scottish Charity Register and submit an application by virtue of section 14³, has not submitted an application or refuses to submit an application, we will equally regard this as a clear breach of section 13 and would move to take appropriate action under the powers available in section 31 and section 34.

Those bodies affected by this issue will have been, or will be, contacted by OSCR.

After having considered their individual requirements, and, if necessary, sought legal advice, they should notify OSCR as soon as possible as to their proposed solution, with likely timescales. The body affected will also have to obtain consent from the Charity Commission for any changes to its governing document. Before making an amendment to their constitution the charity should discuss what they propose to do with the Charity Commission. The powers which individual charities have to make an amendment as described above vary but in most cases it is a legal requirement to have the prior consent or concurrence of the Commission. The Commission will be able to offer assistance to charities considering this. The Commission also plans to issue guidance.

³ Whether or not an organisation which is a charity in England and Wales also needs to register in Scotland depends on whether it has a significant presence in Scotland. OSCR's '[Guidance on registration with the Office of the Scottish Charity regulator \(OSCR\) for England and Wales charities](#)' gives full details. This guidance can be found on the OSCR website: www.oscr.org.uk