



Stewartry Council of Voluntary Service

New Charity Law in Scotland:

The Charities and Trustee Investment (Scotland) Act 2005

Becoming a Charity in Scotland

A Brief outline for **Voluntary & Community** **Groups**

Updated September 2006

Introduction

This is a brief outline of the charitable purposes and public benefit test under which an organisation can apply for charitable status in Scotland.

For help and guidance through the procedures please contact the nearest CVS in your area.

A more detailed Guide to ‘Meeting the Charity Test’ can be found on the website of the Office of the Scottish Charity Regulator www.oscr.gov.uk

You may wish to form a Company Ltd by Guarantee with Charitable status depending on the nature of your activities. You will find at section of this document some initial information about incorporation. Further information on the process for incorporation can be found in another outline document available at Stewartry CVS .

1. New Charity Law in Scotland: The Charities and Trustee Investment (Scotland) Act 2005

The Charity Test

To be a charity in Scotland an organisation must satisfy what is, in effect, a five part charity test:

- 1) its purpose(s) must match one or more of the charitable purposes laid out in the Charities Act *and*
- 2) it provides public benefit *and*
- 3) it is independent from Scottish Ministers or Ministers of the Crown *and*
- 4) its constitution does not permit it to ‘distribute or otherwise apply any of its property’ to a non-charitable purpose (i.e. do something with any of its possessions - including money – that is not in accordance with its charitable aims) *and*
- 5) it is not a political party nor is it set up to advance a political party

Charitable Purposes

These are taken verbatim from the Act but disparate subsections of the Act have been brought together here for the sake of clarity:

- a) the prevention or relief of poverty
- b) the advancement of education
- c) the advancement of religion
- d) the advancement of health (including the prevention or relief of sickness, disease or human suffering)
- e) the saving of lives
- f) the advancement of citizenship or community development (including rural or urban regeneration, the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities)
- g) the advancement of the arts, heritage, culture or science
- h) the advancement of public participation in sport (meaning sport which involves physical skill and exertion)
- 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 (but these facilities or activities must be (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)

j) the advancement of human rights, conflict resolution or reconciliation

k) the promotion of religious or racial harmony

l) the promotion of equality and diversity

m) the advancement of environmental protection or improvement

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

o) the advancement of animal welfare

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

2. Public Benefit

None of the charitable purposes are presumed to be for the public benefit. Instead the Office of the Scottish Charity Regulator (OSCR) must apply the public benefit test, which is that:

“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.”

This means that OSCR have to *weigh up* whether the benefit provided to the public at large by the services/activities of an organisation (either a current charity or one that wants to become a charity) is greater than

a) any benefit gained by the people involved with the organisation itself or any small group of people who couldn't be described as 'the public' - including 'members' of the organisation

b) disbenefit to (i.e. negative consequences for) the public

and whether there are 'undue restrictions' - particularly charges or fees - on 'the public' accessing those services.

This ***doesn't*** mean there can't be ***any***

- benefit to the organisation itself or any small group of people who couldn't be described as 'the public'
- disbenefit to the public
- charges or fees

but, since a charity or would be charity must demonstrate that it provides public benefit, then *presumably* the idea is that the overall public benefit must be great enough to make these things less significant.

It may help to imagine a set of scales where some organisations will very heavily tip the scales on the public benefit side and have no problem remaining /becoming charities whereas some may only just end up weighing in on that side. Others will tip too far in the other direction and won't get to remain/become charities.

3. Independence & Property

The rule above in 3) about Scottish Ministers or Ministers of the Crown is meant to ensure that charities are free from control by Scottish or UK *central* government and also that charities cannot get hold of a bunch of money and other possessions because they have charitable status and then do something with them that is not charitable.

However, Scottish Ministers decided that some charities are allowed to be charities even though they - or Ministers of the Crown - *do* control them and those charities *are allowed* to 'distribute or otherwise apply any of (their) property' to a non-charitable purpose. Ministers intend to exempt them from needing to comply with this bit of the law. The main ones are the Scottish 'National Collections' (national museums, art galleries etc). The Scottish Ministers can also change 'enactments' (usually Acts of Parliament) to allow organisations to remain charities even if they fail the charity test on the same grounds.

There were specific reasons for the intended exemptions and there is little expectation that Scottish Ministers would ever want or need to exempt an 'ordinary' charity from this part of the Act. Similarly they have not yet sought to alter an enactment, although either circumstance could change in future.

4. The Application Process for recognition as a charity

The Office of the Scottish Charity Regulator (OSCR) has established a process for applying to be a charity and details are on the OSCR website. This page deals with what the Act itself says.

To apply to be a charity an organisation must send OSCR the following information in the format required by OSCR. There is an application form and four other guidance documents on their website. SCVS can help guide you through these. Briefly they will need:

- a completed application form
- a Trustee Declaration Form
- contact address (office or named management committee member (who if the application is successful will be come a trustee))
- statement of purposes (bearing in mind the 'charitable purposes') and document detailing your organisation's activities
- constitution or governing document
- most recent statement of accounts (if there is one)
- anything else stipulated either by Scottish Ministerial regulations or by OSCR

If OSCR thinks that the information proves the organisation satisfies the charity test it will grant it charitable status. If not, it won't. It can also refuse to grant charitable status if the charity has 'an objectionable name' (which includes names that are too similar to another charity; likely to mislead the public as to the purpose or activity of the charity; imply a connection to central or local government or are offensive).

Ministers have the power to make regulations concerning the application process. These can cover, for example, information and documentation, the form and manner in which application is made, the time period within which OSCR must make a decision and further grounds for refusing to enter a body on the Register. At the time of writing there is no indication that Ministerial regulations are required, rather OSCR will be able to draw up its own policy and procedures.

5. Voluntary Association or Company Limited by Guarantee?

The decision on whether your group/organisation should become a company limited by guarantee will depend on the nature and scale of your operations. If your organisation is about to enter into a large building contract, the question of possible personal liability should be considered, and you would be wise to consider the options of limited company structures. Your organisation may have to take on longer-term commitments (e.g. a 10 year lease from a commercial landlord) or now has a substantial number of employees. In these circumstances where the responsibilities are rising and it is less easy to protect against unforeseen problems, it would be advisable for the management committee to consider a move towards a company limited by guarantee as their organisational structure.

Advantages of being a company limited by guarantee

- limited liability - as part of the memorandum of association (part of the company's constitution) each of the members guarantees to pay up to a nominal sum (normally £1) towards the company's debts if it goes into liquidation. The members' liability is therefore limited to the sum which they guarantee to pay, hence the name "company limited by guarantee"
- the company is a clear legal entity, separate from the people involved in it and can therefore hold property, enter into leases and other contracts, employ people, etc in its own name.
- a company is generally regarded by funding bodies and public agencies as a more stable and professional structure than a voluntary association

Disadvantages of being a company limited by guarantee

- there are formal registration procedures to be followed to create a company (in addition to applying to be recognised as a charity, if charitable status is needed)
- there is an ongoing requirement to notify a change in directors, a change in the company secretary, or a change in the registered office, to a public register. Also, annual accounts and annual returns have to be filed with Companies House
- there are various statutory requirements which have to be followed in relation to members' meetings etc and the principles of company law which could in certain circumstances have an impact on the company
- a company structure is more intimidating for those considering whether to join as members or put themselves forward for election to the board of directors

- set up costs can be higher than for a voluntary association or trust and annual costs tend to be higher because of the need to comply with company secretarial requirements and the additional matters to be covered in the formal audit (if applicable)

At Stewartry CVS we can help guide you through the decisions, discussions and processes that are an essential part of charitable recognition and company formation.

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Charity no: SC014734.

A company limited by guarantee registered in Scotland no: SC132544.

