

POLICY NOTE

THE CHARITY TEST (SPECIFIED BODIES) AND THE PROTECTION OF CHARITIES ASSETS (EXEMPTION) (SCOTLAND) AMENDMENT ORDER 2015

SSI 2015/148

The above instrument was made in exercise of the powers conferred by sections 7(5) and 19(8) and (9) of the Charities and Trustee Investment (Scotland) Act 2005. The instrument is subject to affirmative procedure.

Policy Objectives

The purpose of this instrument is to exempt Historic Environment Scotland (HES) from the independence test and the asset distribution test set out in section 7(4) of the Charities and Trustees Investment (Scotland) Act 2005 (the 2005 Act) to enable it to apply for charitable status should it so wish to do so. The instrument also allows the Scottish Ministers rather than the Office of the Scottish Charity Regulator (OSCR) to protect assets belonging to HES and bought with public funds, if the body were to become, and then subsequently cease to be a charity.

HES is a new NDPB for the historic environment established by the Historic Environment Scotland Act 2014 (the 2014 Act). HES will take on the functions previously carried out by Historic Scotland and the Royal Commission on the Ancient and Historical Monuments of Scotland (RCAHMS).

Amendment of the Charity Test (Specified Bodies) (Scotland) Order 2006

In terms of section 7(4) of the 2005 Act, a body with a constitution which allows distribution/application of assets to non-charitable purposes (the asset test in section 7(4)(a)) or direction/control by Ministers (the independence test in section 7(4)(b)) is unable to meet the requirements of the charity test. Section 7(5) of the 2005 Act allows Scottish Ministers to exempt, by order, bodies from the asset test in section 7(4)(a) as well as the independence test in section 7(4)(b).

The Charity Test (Specified Bodies)(Scotland) Order 2006 (the Charity Test 2006 Order) disapplied sections 7(4)(a) and 7(4)(b) of the 2005 Act to exempt the national collection bodies listed in the Schedule from the asset distribution/application requirement and the independence requirement of the charity test. Scottish Ministers consider that HES ought to be able to apply to OSCR for charitable status, should it so decide, despite being subject to Ministerial powers of direction because of the unique role it will play in Scottish society and the importance of the Scottish Ministers retaining a degree of control over this public body to ensure it operates within a framework which reflects the policies and priorities of the government of the day.

Article 2 of this instrument amends the Schedule to the Charity Test Order 2006 to add HES to the list of specified bodies in relation to which sections 7(4)(a) and 7(4)(b) of the 2005 Act are disapplied.

Amendment of the Protection of Charities Assets (Exemption) (Scotland) Order 2006

Section 19 of the 2005 Act locks the assets of any body removed from the Scottish Charity Register into charitable purposes. The body has a continuing duty, despite removal, to ensure specified sections of the 2005 Act are complied with in relation to the property. Section 19 also allows OSCR to apply to the Court of Session to approve a scheme for the transfer to a specified charity of any property or income belonging to a body removed from the Register and which is locked into charitable purposes under section 19. Section 19(8) of the 2005 Act allows Scottish Ministers to exempt named bodies, by order, from these requirements.

The Protection of Charities Assets (Exemption) (Scotland) Order 2006 (the 2006 Order) exempts the specified charitable NDPBs (including the national collections), Further Education Colleges and Higher Education Institutions from these requirements. Scottish Ministers consider that in order to protect Government money invested in HES and to help ensure it can continue to carry out its function if it were to lose its charitable status, HES ought to be exempt from the requirements in section 19. This will also allow Ministers, rather than OSCR, to protect assets bought with public funds if HES ceases to be a charity.

Article 3 of this instrument amends Part 1 of the Schedule to the 2006 Order to add HES to the list of specified NDPBs in relation to which subsections (1) to (7) of section 19 of the 2005 are disapplied.

Consultation

Preparation of this order was led by the Scottish Government division which is the sponsor for HES, with input from the Scottish Government division responsible for charity law.

In addition, issues connected with the ability of HES to seek and attain charitable status were discussed during the passage of the Historic Environment Scotland Bill during 2014. The Education and Culture Committee received written and oral evidence from the Cabinet Secretary for Culture and External Affairs [now Culture, Europe and External Affairs] and a number of others, including OSCR and the National Trust for Scotland, during Stage 1 of the Bill.

Impact Assessments

There has been no additional Equalities Impact Assessment (EQIA) carried out for this order, as the issue of charitable status was considered during the EQIA carried out for the 2014 Act. This assessment did not consider there would be any negative impacts if HES were to become a charity, but did consider that there may be a positive impact, particularly on the possibilities for volunteering if HES were to become a large, high profile charitable NDPB.

Financial Effects

No additional Business and Regulatory Impact Assessment (BRIA) has been completed for this order. The impact of charitable status was considered during the BRIA carried out for the 2014 Act which found that there would be no financial impact. No additional BRIA is necessary as the instrument has no financial effects on HES, the Scottish Government, local government or on business. The instrument does not confer charitable status on HES, it merely exempts HES from meeting certain requirements in the charity test in section 7 of the 2005 Act and ensures that Scottish Ministers retain control over public funds and resources created through the expenditure of such funds.

Scottish Government
Culture, Europe and External Affairs Directorate

26 January 2015