

CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) ACT 2005

EXPLANATORY NOTES

COMMENTARY ON PARTS

Part 1: Charities

Chapter 2 – Scottish Charity Register

10. **Section 3** provides that OSCR must keep a public register of charities, reviewing it from time to time, and keeping it up to date. The section specifies certain information that the register must contain for each charity. This mandatory information is:
 - the name of the charity;
 - the principal office or the name and address of one of the charity trustees (unless, under subsection (4), OSCR is satisfied it is necessary to protect an individual or the charity's premises);
 - the charity's purposes; and
 - certain other information (including whether it is a designated religious charity or national collector).
11. In addition the register must include the dates of any directions or notices under the Act that have been given to the charity by OSCR until the direction or notice has been complied with, when it is to be removed.
12. The Scottish Ministers may (under **section 3(3)(f)**) make regulations to add to the mandatory information to be held on the register and OSCR may also decide (subsection 3(g)) to include other information if it sees fit.
13. **Section 4** sets out the information that must be provided to OSCR by an applicant wishing to be entered on the register. This information includes the information required to be shown on the register and also a statement of the applicant's purposes, constitution and the most recent statement of account (if there is one). As a result of section 5 the register will only hold details of organisations that OSCR considers meet the charity test (see below) and do not have inappropriate names. The Scottish Ministers may make regulations (section 6) to set out further details relating to the form of application for the register and the process by which OSCR will determine applications.
14. When the Register is initially set up, **section 99** requires OSCR to enter on it every existing Scottish Charity, i.e. all bodies recognised at that time by HM Revenue and Customs as being eligible for charitable tax relief. Although this does not affect OSCR's power to remove a charity from the register under section 30 (section 99(2)).

The charity test

15. **Section 7** sets out the charity test that must be satisfied by every body on the register. The test consists of two parts: the purposes of the body must be exclusively charitable and it must provide public benefit, either in Scotland or elsewhere. Unlike in the previous charity definition, none of the charitable purposes are assumed to provide public benefit. In addition, the body must not be able to distribute or apply any of its property for a non-charitable purpose, must be free from the control of Scottish Ministers or Ministers of the Crown, and must be non-political. However **subsection 5** allows the Scottish Ministers to disapply, by affirmative order, either or both of the first two of these criteria.
16. The charitable purposes listed in **section 7(2)** are:
- a) prevention or relief of poverty;
 - b) advancement of education;
 - c) advancement of religion;
 - d) advancement of health;
 - e) the saving of lives;
 - f) advancement of citizenship or community development;
 - g) advancement of the arts, heritage, culture or science;
 - h) advancement of public participation in sport;
 - 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 are primarily intended (this purpose is intended to preserve the charitable purpose covered by the Recreational Charities Act 1958);
 - j) advancement of human rights, conflict resolution or reconciliation;
 - k) the promotion of religious or racial harmony;
 - l) the promotion of equality and diversity;
 - m) 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;
 - o) advancement of animal welfare; or
 - p) any other purpose that may reasonably be regarded as analogous to any of the preceding purposes.

Further detail is provided by **subsection 3** which clarifies that:

- the advancement of health (d) includes the prevention or relief of sickness, disease or human suffering;
- the advancement of citizenship and community development (f) includes rural or urban regeneration, and the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities;
- in (h), sport means sport which involves physical skill and exertion;
- the provision of recreational facilities or activities (i) applies only in relation to those which are primarily intended for persons who have need of them by reason of their age, ill-health, disability, financial hardship or other disadvantage or are

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available to members of the public at large or to male or female members of the public at large (again, this seeks to preserve the terms of the Recreational Charities Act 1958);

- the relief of those in need in (n) includes the relief given by the provision of accommodation or care; and
- the advancement of any philosophical belief (whether or not involving belief in a god) is analogous to the purpose for the advancement of religion in (c).

Public benefit

17. **Section 8** sets out certain criteria to which OSCR and the courts must have regard when determining whether a body provides public benefit as part of the charity test. The first criterion covers the extent of any benefit gained by members or other persons or the disbenefit incurred by the public as a result of the body's functions compared to the benefit to the public. The second criterion covers the extent to which any condition (including any charge or fee) restricting persons from obtaining the benefits from a body's functions may be unduly restrictive if only a section of the public can receive those benefits.
18. **Section 9** gives OSCR a statutory duty to issue guidance, following consultation with representatives of the charitable sector and such other persons as it sees fit, on how it determines whether a body meets the charity test.

Charity names and status

19. **Section 10** sets out the circumstances when a body's (including SCIOs – see **section 49**) name may be considered to be objectionable. These are to ensure that an applicant's, charity's or proposed SCIO's name is not too similar to that of another charity, likely to mislead the public, give the impression (falsely) that the body is connected to the Government, local authority etc., or is offensive.
20. Under **section 11** a charity must inform OSCR at least 42 days before it wishes to change its name, and unless OSCR directs the charity not to do so within 28 days, permission is deemed to have been granted. OSCR may refuse to the change only if it considers the proposed name falls within the circumstances describes in section 10 as objectionable.
21. If a charity considers that another charity has a name too similar to its own, it can ask OSCR to review the names (**section 12**). If satisfied that there may be confusion, OSCR must direct either or both of the charities to change its name and must remove from the register a charity which refuses.

References to charitable status

22. **Section 13** places restrictions on the way that bodies may use the term "charity" to describe themselves in order to protect the charity brand and attempt to avoid confusion for the public. Under **section 13(1)**, only bodies entered in the Scottish Charity Register ("the Register") may refer to themselves as a "charity", a "charitable body", a "registered charity" or a "charity registered in Scotland". Bodies registered elsewhere, such as with the Charity Commission in England and Wales, often currently refer to themselves as "registered charities", but under this Act they will not be able to do this in Scotland unless they are also registered with OSCR or specifically note where they are registered, for instance that they are "registered in England and Wales" or "with the Charity Commission".
23. Under **section 13(2)**, bodies on the Register which are established under the law of Scotland, or are managed or controlled in Scotland may use the terms "Scottish Charity" or "registered Scottish charity" to describe themselves. This provision aims to distinguish those charities which are directly registered with OSCR and based in Scotland from those which may be based elsewhere but also operate here.

24. A large number of “foreign” charities (i.e. registered outside Scotland) may only have relatively minor operations in Scotland, such as sending a newsletter or information to Scottish members, awarding a grant to a body in Scotland or merely advertising in a newspaper which may also be seen in Scotland. Under **section 14**, as long as they are registered elsewhere, do not occupy premises or carry out activities in an office, shop etc. in Scotland, these bodies may operate in Scotland using the term “charity” without having to register with OSCR only if they also refer to the territory where they are registered as charities. Hence such a body might, for example, refer to itself factually as a “charity registered in England and Wales” a “French charity” or a “charity recognised by the HM Revenue and Customs” in Northern Ireland.
25. It is intended that all charities will have to clearly label their main documents to show that they are a charity and are registered (with names as set out above). **Section 15** confers powers on the Scottish Ministers to make regulations requiring this and setting the detailed provisions about which documents must state a charity’s name etc. This will allow the Scottish Ministers to vary the documents to be labelled over time as different forms of communication or finance are introduced or to exempt certain charities or types of charity from some of these requirements. Initially, after allowing sufficient time for existing stocks of documents to be used up, it is expected that charities will have to label documents such as cheques, credit cards and annual reports, headed notepaper, raffle tickets and other advertising material etc.

Changes

- “26 Many changes that a charity may wish to make to its constitution may only be made with the consent of OSCR. This is because these changes could affect a charity’s status on the Scottish Charity Register. **Section 16** lists those changes requiring OSCR’s consent as those amending the charitable purposes in its constitution, amalgamating with another body, winding up or dissolving. If the change is to amend its purposes, the charity must give OSCR 42 days notice of the proposed change and may not carry out the change without OSCR’s consent. For the other changes, unless OSCR is willing to consent to the changes it must, within 28 days of being informed of the charity’s proposals, either refuse consent to the change or direct the charity not to make the change for a set period (up to 6 months) whilst it makes a determination. If neither of these actions is taken, OSCR is considered to have consented to the proposal.
27. Several other types of change which a charity may wish to make to its organisation may be made without OSCR’s consent (**section 17**), but the charity must inform OSCR within 3 months of the action being taken. These changes include: a change to the charity’s principal office or name of charity trustee specified on the register, other changes to details on the register, changes to its constitution (apart from its purposes), any amalgamations, winding up or dissolving actions taken by the charity (following OSCR’s agreement). Similarly OSCR must be informed of changes within 1 month following orders by the court to wind up or put the charity into administration or appoint a receiver.

Removal from the Register

28. **Section 18** requires OSCR to remove a charity from the Scottish Charity Register within 28 days of receiving an application from the charity itself requesting this, and to confirm in a notice that this has been done.
29. Under **section 30(1)**, one of the regulatory actions available to OSCR upon completion of inquiries about a charity is that it must remove a charity from the register if it is satisfied that the charity no longer meets the charity test. If OSCR, following inquiries into a charity, gives a direction to the charity to take certain steps, but the charity fails to comply, OSCR must remove the charity from the register.
30. However, even when a body has been removed from the Register, any assets held by the body before it was removed which were raised to be used for charitable purposes are

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effectively “locked” for charitable uses. **Section 19** protects such assets, ensuring that several provisions of the Act continue to apply to them, despite the charity’s removal from the register. The following provisions continue to apply:

- **Sections 28 and 29:** power of OSCR to make inquiries about charities (i.e. the body holding the protected assets), and to obtain documents and information;
 - **Sections 31(1) to (3), and (5) to (9):** powers of OSCR following inquiries;
 - **Section 32:** notices and directions under section 31;
 - **Section 33(2) to (5):** reports on inquiries;
 - **Section 34(1) to (3), (5)(a) to (c) and (f) to (h), (7) and (10)(b):** powers of Court of Session;
 - **Section 37:** on charging expenses for a transfer scheme; and
 - Chapter 6: **sections 44 and 45** on charity accounts.
31. These provisions allow OSCR to continue to oversee the use of the locked assets even though the body holding them is no longer a charity. It can investigate and take action if required. It can ensure that the body continues to prepare accounts showing how the assets are being used.
32. Under **section 19(4)**, OSCR may apply to the Court of Session for a scheme to transfer the locked assets of a charity removed from the register to another charity. A transfer scheme may only be approved if the Court is satisfied that it is needed to protect the assets or secure their proper application for the original purposes, and that such a transfer is the better way for this to be achieved. **Section 19(8)** allows the Scottish Ministers to exclude certain property which they specify in an affirmative order from this section. The Scottish Ministers would have to have made an order specifying either items or types of property or property owned by particular persons which come under this description. This would, for instance, allow the Scottish Ministers to ensure that national assets owned by a charity removed from the Register could not be transferred to other bodies, potentially being lost to the nation.