

## **The Charities Trustee Investment (Scotland) Act 2005 Registration of Charities in Scotland and recent developments**

The purpose of this note is to provide you with a consolidated summary of events that have recently occurred in regard to registration in Scotland. At the end of the note we set out the present position and the available options.

### **Background**

New provisions requiring English charities to register in Scotland came into force in April 2006 when the Charities Trustee Investment (Scotland) Act 2005 ('the Act') was introduced.

Under the new legislation, if a charity is undertaking significant operations in Scotland and requires charitable status, it is under an obligation to register with the Office of the Scottish Charity Regulator (OSCR). This requirement applies even if the charity is already registered in England and Wales.

In considering applications, OSCR will examine whether the charity meets the 'charity test' as outlined in section 7 of the Act. The test is based on the following four principles:

- 1) A body must have only charitable purposes (as listed in section 7 of the Act)
- 2) The constitution of the body must not allow its property to be used for non-charitable purposes; must not contain in its constitution express power of direction or control by Ministers; must not be a political party or have as its purpose to advance a political party.
- 3) It must provide public benefit in Scotland or elsewhere. In determining whether a body does so, OSCR must have regard to how the benefit to the public compares to any private benefit or any disbenefit that may result from activities of the particular body.
- 4) OSCR must have regard to whether there are unduly restrictive conditions on obtaining the benefit the body provides.

Since the legislation was introduced a large number of English and Welsh charities have tried to register in Scotland but have been unsuccessful. The rejections have predominantly occurred because of the difference in the way 'charitable purposes' is defined in Scottish law and English law. Although the definition in both jurisdictions is similar, it is not the same.

Many charities' governing documents include the term 'charitable purposes' either in their objects clause or in the winding up clause. As the English and Welsh charities were established under English law, OSCR determined that the wording used in the governing documents would be interpreted according to the definition of 'charitable

purposes' as set out in English law. This definition, as mentioned above, is slightly different to the one set out in the Scottish legislation.

OSCR has, therefore, rejected applications on the basis of section 7(4)(a) of the 2005 Act which provides a charity will fail the test for registration if:

“...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...”

It is important to note that some charities have been able to meet the 'charitable test' as set out in the Scottish Act in relation to their objects but have failed on the basis of the reference to charitable purposes as set out in their dissolution clauses.

During the initial rejections, OSCR suggested the following wording should be included in the governing documents of charities to enable them to meet the registration test:

“Throughout this trust deed 'charitable purpose' is a purpose that is regarded as charitable both in the law of England & Wales and the law of Scotland, and the term 'charitable' is to be interpreted in accordance both with the law of England & Wales and the law of Scotland” (***wording A'***).

Those charities which had been affected by this problem were given an extension of time to consider how they wished to proceed.

### **Making amendments to the governing documents**

In order to register with OSCR, it seems that the only way forward is to amend the governing documents of those charities that are affected by this problem. In many cases, and particularly those of Religious Order charities whose Trust Deeds are based on the model document drawn up in the 1960s, such amendments can only be made by way of a Scheme and with the consent of the Charity Commission. This is because there is no power of amendment in the Trust Deeds and amendments to charitable purposes must be by way of a Scheme.

We notified the Charity Commission that this would be an issue in regard to some of our clients which operated in Scotland. We also advised them that the amendments suggested by OSCR could only occur by way of a Scheme. The Charity Commission agreed with us and, in March 2007, advised us that they would be meeting with OSCR to discuss the issue of amendments to the objects and dissolution clauses of English and Welsh Charities that wished to register in Scotland.

Following this the Commission suggested that the following wording should be used in the governing documents of English charities wishing to register with OSCR:

“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 avoidance of doubt, the system of law governing the constitution is the law of England and Wales”. (**‘wording B’**)

While this wording is acceptable both to the Charity Commission and OSCR the effect is to limit the objects of the charity to those purposes which are charitable in Scotland and those purposes which are charitable in England and Wales. In practice this might be of little consequence to some charities but it does impose fairly specific limitations. The biggest impact will be for those charities that have significant operations outside of England and Wales and Scotland. The legal issue is that the Scottish list of charitable purposes is narrower than that in England and Wales. Whilst this is not of great significance at the moment, the issue could become more of a problem once the Scottish Courts have begun to interpret the Act. This could lead to a wider difference between the laws of the two jurisdictions.

At the end of August 2007, OSCR reconsidered their original suggestion of wording A and provided the following suggestion in addition to wording B (which was still acceptable to them):

“Nothing in this constitution shall authorise an application of the property of the charity for purposes which are not charitable in accordance with Section 7 Charities and Trustee Investment (Scotland) Act 2005” (**‘wording C’**)

The suggestion is that wording B will be used where objects clauses are incompatible with the Act and wording C will be used in relation to dissolution clauses. Wording A is to be ignored and is no longer recommended.

We would suggest that the wording outlined in wording C is even more restrictive than the wording set out in wording B as the effect is to limit the application of the charity’s funds on dissolution to those purposes which are relevant only to Scotland.

### **Options available**

We believe that the following options are now open to charities facing this issue:

#### **1. Establish a separate Scottish charity and make a new application**

A new charity could be established in Scotland to take over the current operations there and this body could then apply to OSCR for registration.

For the majority of Religious Order charities this does not represent a practical solution as Scotland will generally be administered as part of an English or Irish Province. Operations in Scotland are often relatively limited. Further, there is a legal issue in that Scottish law is narrower than English law. If assets were transferred from an English charity to a Scottish charity, the trustees in England would effectively be saying that those funds would be

applied for narrower purposes in future. This goes against the principle of English law that, unless trustees are making a specific decision about spending money, they should not seek to limit their discretion by unnecessarily restricting the purposes for which funds may be applied within the objects laid down in the governing document.

This also means that the charity will have a separate operation in Scotland and will have to comply with administrative matters there in addition to the administrative matters it complies with in England.

This route is not recommended unless the charity thinks that it has significant enough operations in Scotland to warrant such a move.

2. The charity has the option to use the wording B and or wording C as recommended by the Charity Commission and OSCR. However, as we have noted above the use of this wording is likely to restrict the charity's activities to England and Wales and Scotland, or in the case of wording C, just Scotland.

The Charity Commission does not appear comfortable with the wording it has agreed with OSCR. This is due to the fact that any charity adopting it will, in effect, be narrowing its purposes to meet Scottish law. As mentioned above, this goes against English law. Charities established in England are subject primarily to the jurisdiction of the English Courts. The situation that has arisen here is a 'conflict of laws'. Generally, in such cases, the law of the 'home' jurisdiction, i.e. England in this case, should prevail.

3. The charity can seek to amend its constitution but use different wording to that agreed by the Charity Commission and OSCR. Such alternative wording would need to be agreed by both regulators. We would be happy to prepare such wording but anticipate that it could be difficult to come up with a solution that would overcome the problem highlighted above with the current wording on offer and be acceptable to all concerned.
4. The charity can withdraw its application and refuse to amend its constitution. If you decide to withdraw your application, refuse to amend the constitution and carry on operating in Scotland, OSCR has said that it will refuse to register any such charity. Further, if the charity holds it self out as a charity in Scotland, OSCR will consider this to be a breach of section 13 of the Act which means that the charity cannot call itself a charity in Scotland unless it is registered in Scotland or established under the law of Scotland. OSCR then has the power to take punitive action under section 31 and section 34 of the Act.

For many Religious Order charities, which do not carry out fundraising activities, it is questionable whether they are holding themselves out as charities in Scotland anyway. Under English law there is a requirement to have registered charity status noted on various documents such as notepaper. Therefore, an English charity needs to observe this requirement. However, an English charity operating in Scotland could include wording such as the following on documents:-

“Registered as a charity in England & Wales – registered charity number...”

We do not recommend this course of action if you wish to continue holding yourself out as a charitable organisation in Scotland due to significant fundraising activities or for other reasons.

The main benefit of charitable status is the tax concessions available. Tax law is still dealt with at UK level so registration with OSCR is not required to continue to benefit from these concessions. If a charity benefits from business rates relief in Scotland the position could be different but we would then anticipate that the operations in Scotland would be significant and this option might not be the best to adopt.

5. You might decide to withdraw from Scotland and not carry on any operations there. However, you should note that, in the event that you resume operations and continue to hold yourself out as a charity, you will be required to register in Scotland unless you have minor operations or are carrying on low key fundraising in Scotland, in which case you have to make it clear that you are registered as a charity in another jurisdiction.

## **Conclusion**

The process of registering English and Welsh charities with OSCR has become a very difficult issue which was not the intention. Due to the conflict of laws between the two jurisdictions there is no easy answer for charities affected. Each charity clearly needs to consider its own position but Option 4 above may well be the best solution for charities which have few operations in Scotland and which are administered in England and Wales.

The information provided in this handout is guidance only and is not in anyway meant to be the provision of an opinion or legal advice. If you require further information please contact Gerald Kidd on [info@pwwsolicitors.co.uk](mailto:info@pwwsolicitors.co.uk)