

Charities and Public Benefit in Scotland - the story so far...

The question of independent schools and charitable status has been a hot topic for as long as we can recall. It has been, and indeed still is, the source of fierce, emotive debate that touches on issues that are political, legal, educational, financial and philosophical, issues that are crucial to our well-being as a sector.

Until recently, charitable status throughout the UK was governed by legislation in the Westminster Parliament; the position changed in 2005 when the Scottish Parliament, or Holyrood as it is called locally, passed the Charities and Trustee Investment (Scotland) Act 2005. The Charities Act 2006 was passed by the Westminster Parliament the following year.

Now that we have two separate jurisdictions, are the issues different for schools north and south of the border? It is too soon to be able to give a definitive answer to that question, although our respective regulators, the Charity Commission in England and the Office of the Scottish Charity Register (OSCR) in Scotland, appear to be working on similar principles. They certainly work closely together and it would seem strange for there to be fundamental differences in the way in which public benefit is considered for comparable schools north and south of the border.

Let us look at the facts. Under both Acts, the advancement of education remains a charitable purpose. This has been the position for hundreds of years and it is important that we have been able to retain that status. The change in both jurisdictions is that we are now required explicitly to demonstrate our public benefit. Indeed, in Scotland, we have to demonstrate that we provide public benefit, an intention to do so not being sufficient, as we have discovered in the recent reviews carried out by OSCR.

OSCR took the view that independent schools should be amongst the first to be reviewed, given the high profile of fee charging organisations and the doubt around whether they could meet the public benefit requirement. Towards the end of 2006, OSCR decided to run 7 pilot reviews, selecting 7 different types of charity, including one independent school, the High School of Dundee. The review was a complex exercise for both OSCR and the charities, as evidenced in the report that was published in July 2007. The High School of Dundee passed the charity test with a clean bill of health and will not be reviewed for a further 7-10 years.

Towards the end of 2007, OSCR announced that it was undertaking a further pilot, this time of 30 charities across a wide spectrum of organisations. 10 independent schools were included, covering boarding schools, large city day schools, small schools, faith schools and special schools. The results were announced in October 2008 – 6 of the schools passed the charity test and 4 schools were issued with Directions. This means that they were given time to consider their position and to produce a plan that will demonstrate that they are able to meet the charity test. The schools were given three months to indicate to OSCR whether they intended to comply with the Direction and all have indicated that they intend to do so. They now have a further 9 months, until the end of October 2009, to produce a plan to show how they will increase access arrangements, or produce some other strategy, to ensure that they will be able to meet the public benefit requirement of the charity test. They then have until October 2011, three years from the date of Direction, to show the regulator that they can meet the objectives of their plan.

In the summer of 2009, we saw the results of the 5 independent schools in England reviewed by the Charity Commission, 3 of which were deemed to operate for the public benefit, 2 of which did not satisfy the Charity Commission's requirements.

In the case of the four Scottish schools that were given Directions, OSCR concluded that “having had regard to fees charged... on balance public benefit was not provided and the charity test was not met”. OSCR took the view that the schools should consider what they could do to overcome the restriction represented by significantly high levels of fees, to allow for beneficiaries “from a wide range of incomes, including those on low incomes”. It was clear that means-tested assistance would have the most significant impact on opening up access.

We were all disappointed that four of the schools did not pass first time round, although the plans they submitted to OSCR in October 2009, which indicated how they propose to meet the requirement, were approved. The four schools now have two years to implement their plans.

SCIS is confident that the four schools will pass the test which means that all 11 schools reviewed to date will have been able to demonstrate their charitable purposes and their commitment to public benefit.

The process has highlighted our responsibilities as charities. We have had a good hard look at ourselves, asked some fundamental questions and assessed what is in the best interest of the children for whom we are responsible. We have taken the view in public debate that charitable status is about more than tax benefits, that it is also about the advancement of education, the ethos of our schools and our original *raison d'être*. There are difficult decisions to be made but whilst the schools remain on the Charity Register, they have to comply with an Act that sets public benefit in a new context.

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