

03/08

GUIDANCE NOTES ON
CHARITABLE STATUS AND BOARD OF
MANAGEMENT MEMBERSHIP

Introduction

The purpose of this Guidance is to provide advice to the Association of Scotland's Colleges ("ASC") in relation to the following matters:-

This guidance covers the following topics:-

- 1. The Charity Test (Specified Bodies) (Scotland) Order 2008; and**
- 2. Membership of Boards of Management by non-United Kingdom residents.**

1. Background

- 1.1 The Charities and Trustee Investment (Scotland) Act 2005 ("the 2005 Act") came into force in April 2006 with the aim of informing and modernising charity law in Scotland. New requirements and duties were introduced and applied to all bodies with charitable status. Those of Scotland's colleges which are charitable bodies are, therefore, subject to the 2005 Act.
- 1.2 Sections 7 and 8 of the 2005 Act place a requirement on all charities (and so including those of Scotland's colleges which are charities) to demonstrate to the Office of the Scottish Charity Regulator ("OSCR") that they meet the "charity test". However, under Section 7 (4)(b) of the 2005 Act, a body which might otherwise meet the "charity test" will not meet the charity test if its constitution expressly permits the Scottish Ministers or a Minister of the Crown to direct or otherwise control its activities.
- 1.3 OSCR published its Rolling Review Pilot Study Report on 18 July 2007. John Wheatley College in Glasgow volunteered to take part in the review, one of the specific purposes of which was to establish whether the constitutional arrangements of Scotland's colleges did or did not expressly permit Ministerial powers of direction or control. The constitution for John Wheatley College and for the majority of Scotland's colleges is the Further and Higher Education (Scotland) Act 1992, as amended ("the 1992 Act").
- 1.4 After carrying out checks on the requirements set by Sections 7 and 8 of the 2005 Act, OSCR declared that John Wheatley College's constitution did not comply with Section 7 (4)(b) of the 2005 Act, as the 1992 Act gave Scottish Ministers a wide range of powers.
- 1.5 OSCR concluded that as the constitution of John Wheatley College (and, in turn, the majority of the rest of Scotland's colleges) expressly permitted Scottish Ministers to direct or otherwise control its activities, the charity test was not met.
- 1.6 OSCR directed John Wheatley College to take steps, within 2 years to ensure that either:-
 - (a) the powers listed within their Report are removed from or amended in the 1992 Act; or
 - (b) an Order is made to disapply the relevant Section (s) of the 2005 Act in relation to John Wheatley College.

2. The Charity Test (Specified Bodies) Scotland Order 2008

- 2.1 In exercise of the powers conferred by Section 7 (5) of the 2005 Act, the Scottish Ministers published The Charity Test (Specified Bodies) Scotland Order 2008 ("the Order") on 21 May 2008. The Lead Committee approved the Order on 18 June 2008 and the Order came into force on 27 June 2008.
- 2.2 By this Order, the Scottish Ministers would disapply Section 7 (4)(b) of the 2005 Act in relation to the bodies specified in the Schedule to the Order. The Schedule to the Order goes on to list the Boards of Management of all of Scotland's colleges whose constitution comprises of the 1992 Act.
- 2.3 Provided the "charity test" is otherwise met in terms of the 2005 Act, the bodies listed in the Order will not be denied charitable status as a result of their constitution under the 1992 Act allowing a degree of Ministerial control. By disapplying Section 7 (4)(b) of the 2005 Act, the Scottish Ministers are therefore looking to ensure the ongoing charitable status of Scotland's colleges.

3. Implications for Scotland's colleges

- 3.1 By making an Order disapplying Section 7 (4)(b) of the 2005 Act in relation to the Boards of Management of Scotland's colleges listed in the Order, the Scottish Ministers have opted to follow the second option that was originally highlighted in ASC's Guidance Note on charitable status of Scotland's colleges (Guidance Note 03/07).
- 3.2 It should be noted, however, that according to OSCR after its review of John Wheatley College, any Order made would also require to disapply Section 7 (4)(a) of the 2005 Act. Section 7(4) (a) of the 2005 Act provides that even if the other requirements of the "charity test" are met a body will not be granted charitable status if its constitution allows it to distribute any of its property for a non-charitable purpose. OSCR had included within their Report on the John Wheatley College that the requirements to pay part of the proceeds of any sale of property to the Scottish Ministers under Section 18 (5) of the 1992 Act appeared not to comply with the requirements of Section 7 (4)(a) of the 2005 Act in that it allowed for the distribution of property for non-charitable purposes.
- 3.3 Given that the Order only disapplies Section 7 (4)(b) of the 2005 Act, it is possible that the Boards of Management of Scotland's colleges may still fail to meet the "charity test". The Scottish Ministers will therefore need to consider laying a second Order to disapply Section 7 (4)(a) of the 2005 Act.
- 3.4 On 3 September 2008, the Scottish Government published "Moving Scotland Forward: The Government's Programme for Scotland 2008 - 2009."¹ Section 5 ("A Smarter Scotland") refers to the measures it has already undertaken "enabling colleges to retain their charitable status, laying the first of two Orders to allow for this, with the second Order to follow later this year". The second Order referred to should hopefully deal with the need to disapply Section 7 (4)(a) of the 2005 Act.

¹ Full text available at www.scotland.gov.uk/Publications/2008/09/01093322/7

1. Membership of Boards of Management by Non-UK Residents

- 1.1 ASC has received queries from its membership regarding whether or not it is possible for a non-UK resident to serve on a college Board of Management.
- 1.2 A review of the Further & Higher Education (Scotland) Acts of 1992 and 2005 discloses that there is nothing in either of these statutes that would prevent a non-UK resident from serving on a college Board of Management, so long as they are not deemed ineligible for appointment as a member of the Board under paragraphs 6 and 7 of Schedule 2 of the 1992 Act.
- 1.3 In addition, there is no issue regarding non-UK residents having to meet any additional requirements as "Charity Trustees" other than the requirements already provided under Sections 66 to 70 of the Charities & Trustee Investment (Scotland) Act 2005.
- 1.4 Although there is nothing within the abovementioned legislation which would prevent a non-UK resident from serving on a college Board of Management, there may still be other practical considerations which may make it more difficult for a non-UK resident to be appointed to a college Board of Management. For example, under the Protection of Children (Scotland) Act 2003 it is an offence to offer work (including voluntary positions) in a child care position to an individual who is disqualified from working with children by virtue of being named on the Disqualified from Working with Children List held by the Scottish Ministers. If it is the case that a foreign national has only been resident in the UK for a short period of time, there may not be enough information available to Disclosure Scotland to enable it to provide a clear disclosure check for that individual.

Status of Guidance

This Guidance relates only to specific obligations applicable to Scotland's colleges as a result of the legal requirements of (i) the Order (as outlined above), and (ii) membership of Boards of Management by non-UK residents; and does not cover any other legal obligations which may apply to Scotland's colleges under this and any other legislation referred to in this Guidance or otherwise.

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on behalf of the Association of Scotland's Colleges
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