Introduction

The Office of the Scottish Charity Regulator (OSCR) is established under the Charities and Trustee Investment (Scotland) Act 2005 (2005 Act) as a Non-Ministerial Department forming part of the Scottish Administration. OSCR is the registrar and regulator of charities in Scotland. There are currently over 23,500 charities registered in Scotland.

OSCR has been asked to give a view to the Scottish Parliament Education and Culture Committee on the Post-16 Education (Scotland) Bill. In particular, we have been asked to comment on whether the bill would affect Colleges’ charitable status.

This note is intended to clarify OSCR’s position. In forming our view we have considered our overall vision, which is for charities you can trust and that provide public benefit, underpinned by the effective delivery of our regulatory role.

The charity test

Generally, where an organisation wishes to represent itself as a charity in Scotland, the 2005 Act requires that it must be entered in the Scottish Charity Register.

To be registered as a charity in Scotland, an organisation must pass the charity test, which is set out in sections 7 and 8 of the 2005 Act. This means the organisation must have charitable purposes and provide public benefit in Scotland or elsewhere. There are also some specific requirements (in section 7(4) of the 2005 Act) which mean that even where an organisation meets the charitable purpose and public benefit requirements it will not meet the test. The most relevant of these are that an organisation does not meet the charity test if

- a) 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 (‘the distribution of assets condition’)  
- b) its constitution expressly permits the Scottish Ministers or a Minister of the Crown to direct or otherwise control its activities (‘the ministerial direction and control condition’)

However (and this is relevant to the FE Colleges) section 7(5) of the 2005 Act allows Scottish Ministers to disapply either or both of (a) and (b) by making an order in respect of an organisation or organisations.

FE Colleges’ current charitable status

As things stand, all FE colleges (or more precisely their Boards of Management) in Scotland are entered in the Scottish Charity Register and thereby have charitable status. This is despite the fact that their constitution, the Further and Higher Education (Scotland) Act 1992 (as amended) would, in the normal course of things, cause them to fail the charity test under the ministerial direction and control condition. The provisions in the 1992
and succeeding acts which set out how the colleges will be governed contain a number of powers of control for Scottish Ministers, including among other things powers for Ministers to close or merge colleges and powers to remove trustees.

However, Ministers made use of the power provided in section 7(5) of the 2005 Act and disapplied the ministerial direction and control condition for all of the FE College Boards of Management listed in the Charity Test (Specified Bodies) (Scotland) Order 2008.

Effect of the Bill on FE Colleges’ charitable status

The Post-16 Education (Scotland) Bill introduces the concept of two types of college, the regional college and the college within a region.

Regional colleges

In terms of the regional college (which is likely to be the product of formal merger between existing colleges), the bill includes a number of provisions relevant to the colleges’ charitable status.

Firstly, it sets out the functions of the regional colleges (in a proposed new section 23A of the Further and Higher Education (Scotland) Act). These new functions would be treated as indicating the purposes of the regional colleges in terms of the charity test. We would be likely to find that these were charitable purposes and would therefore allow the regional colleges to pass that part of the charity test.

Secondly, the Bill contains a number of provisions which would, to a greater or lesser extent indicate powers of control for Ministers additional to the powers Ministers already have over the FE colleges. These include the power to appoint of Regional College chairs and to approve Board appointments. In addition, section 7 of the Bill extends the existing powers of Ministers in relation to removal of Board members, listing additional circumstances where they may be removed.

While these powers would in the normal course of things affect whether a college would fail the charity test under the ministerial direction and control condition, we anticipate that the Charity Test (Specified Bodies) (Scotland) Order 2008 would be extended or amended to cover the regional colleges and so disapply the condition.

Overall, then the Bill will not affect the charitable status of the colleges which become regional colleges.

Colleges within regions

Turning to the colleges within regions, we note that the Bill also contains provisions to establish regional boards, to which Ministers can assign individual colleges. The Bill gives significant powers over individual colleges to the regional boards. Most notably, they have a power to give binding directions to individual colleges. This would not cause the college to fail the charity test under the Ministerial direction and control condition, since that only applies where Ministers exercise the power of direction. This provision would not affect the charitable status of the colleges within regions therefore (though see further comments below).
The regional board can also require a college within its region to transfer staff, property, rights, liabilities or obligations to another college in the region or to the board itself. This is relevant to the distribution of assets condition in the charity test. However, since the Bill provides that these assets must be used for the advancement of education, which is a charitable purpose, this provision would not cause a college to fail the charity test.

Overall, the Bill will not affect the charitable status of the colleges which become colleges within regions.

Our understanding is that it is not planned that the regional boards would seek charitable status, and we have not considered them from this point of view.

Other issues

We noted above the power that the Bill contains for regional boards to give directions to colleges within their region. We noted that this would not affect the colleges’ charitable status. However, it may be worth considering the effect of such a direction power where it is exercised on the governance of a college.

The members of a college board as the charity trustees of the college have a number of duties under section 66 of the 2005 Act, with their overall duty being to act in the interests of the charity, that is, the individual college. In general it would be safe to assume that compliance with legislation will be in the interests of a charity, and indeed compliance with applicable legislation is a duty on trustees under the 2005 Act.

However, it is possible to conceive of a situation (though it may not be particularly likely) where a regional board gives a direction to a college which, though it perhaps may be in the interests of education in the region as a whole, the charity trustees do not feel to be in the specific interest of the college. Charity trustees in such a case might feel themselves to be in a complex and conflicted position.

We do note that section 23K of Bill imposes a duty on regional boards to consult various parties, including the colleges themselves, before issuing such a direction, and this may help to avoid the situation indicated above.

OSCR
28 February 2013