Consultation Response

Consultation on the Historic Environment (Scotland) Bill: Education and Culture Committee

Response from the Scottish Charity Regulator 17 April 2014

1. Background

The Office of the Scottish Charity Regulator (OSCR) is established under the Charities and Trustee Investment (Scotland) Act 2005 (the 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 23,800 charities registered in Scotland.

2. Consultation response

The consultation asks a series of questions about the functions and objectives of the new body Historic Environment Scotland (HES), including the possible benefits of HES being granted charitable status.

The question of HES seeking charitable status is a matter for the new body to consider once it is constituted. As Regulator it would not be appropriate for OSCR to express a view on the possible advantages and disadvantages of charitable status in any particular case. However, we have been in dialogue with Scottish Government during the drafting of the Bill about the proposed new body and the possibility of HES seeking charitable status.

To have charitable status, bodies must pass the charity test set out in sections 7 and 8 of the 2005 Act. They must have only charitable purposes and provide public benefit in furtherance of those purposes.

OSCR has had sight of the Functions of Historic Environment Scotland in section 2 of the Bill (which we would view as the purposes of HES) and our view is that in principle these can be clearly linked to one or more of the charitable purposes set out in the 2005 Act, specifically the advancement of education the advancement of
the arts, heritage, culture or science. This would address the first part of the charity test under the 2005 Act.

The second part of the charity test requires a body to provide public benefit when advancing its charitable purposes. A full assessment of the (intended) public benefit would be required should HES decide to apply for charitable status. OSCR would look at the actual activities and set up of HES in the light of the requirements of section 8 of the 2005 Act, including any issues of disbenefit, private benefit or undue restriction.

More relevantly in this case, the charity test requires that a charity’s constitution does not allow Ministers to direct or control the activities of the charity, and that it does not allow its assets to be used for non-charitable purposes. We note that among other powers for Ministers, section 12 of the Bill as introduced gives Ministers the power to give directions to HES, with which HES must comply (though not in respect of all of its functions). While this is a power which would normally be likely to prevent HES from meeting the charity test, the 2005 Act allows Ministers to disapply the charity test requirements about Ministerial direction and use of assets by order in particular cases. Ministers did this in the case of RCAHMS along with other national collections under the Charity Test (Specified Bodies) (Scotland) Order 2006.

Even where these requirements are disapplied, there is still a duty for the charity trustees to ensure that they act in the charity’s best interests and deal appropriately with any conflict of interest regarding Ministers.

With its regulatory functions HES would (if charitable status were granted) be an unusual charity, but not unique. There are already bodies on the Scottish Charity Register which have statutory duties or powers to undertake regulatory functions, for example the General Teaching Council for Scotland and Scottish Society for the Prevention of Cruelty to Animals.

3. Conclusion

OSCR has welcomed the opportunity to respond to this consultation and looks forward to the development of the legislation. We are already in discussion with officials in the Scottish Government about the possibility of HES seeking charitable status and will continue to engage should the new body decide to apply to OSCR.

Should you wish to discuss any aspect of the response please contact: Caroline Monk, Engagement Manager: Policy and Guidance

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This response has been copied to the Finance Committee for information.