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.

Further to our briefing note of 26 February OSCR has been asked to give a view to the Scottish Parliament Education and Culture Committee on the effect of Post-16 Education (Scotland) Bill on charitable status of universities and HE institutions.

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’)

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.

Universities’ current charitable status

As things stand, all universities in Scotland are entered in the Scottish Charity Register and thereby have charitable status. The nature of universities’ constitutional arrangements varies widely, from older institutions where constitutions have developed over a long period to institutions set up under the Further and Higher Education (Scotland) Act 1992.
In contrast to the situation with FE Colleges, Ministers have not had occasion to make use of the power provided in section 7(5) of the 2005 Act to disapply the ministerial direction and control condition in respect of universities as such powers have not been present in the constitutions of these charities.

**Effect of the Bill on universities’ charitable status**

The Post 16 Education Bill includes a number of provisions which amend or extend Ministers’ powers to impose conditions on the Scottish Funding Council (SFC) in respect of terms and conditions to be attached to payments to HE institutions. These include:

- **Section 2 of the Bill** – allows Scottish Ministers to impose a condition on SFC such that when it makes a payment to and HE institution it must require the institution to comply with any principles of governance or management which appear to Ministers to constitute good practice.
- **Section 3 of the Bill** – allows Scottish Ministers to impose on SFC terms and conditions on payments for the purposes of increasing participation in fundable further education by persons belonging to any socio-economic group which they reasonably consider to be under-represented in such education (including a widening access agreement).
- **Section 4 of the Bill** – allows Ministers to impose terms and conditions to require an institution to ensure that the fees it charges must not exceed a certain amount.

These powers do not change the constitutions of the HE institutions to which they may be applied. Instead they relate to funding conditions. In themselves therefore they do not affect charitable HE institutions’ compliance with the ministerial direction and control condition, since this relates to express provisions in constitutions.

The Bill will therefore not affect the charitable status of universities and HE institutions currently entered on the Scottish Charity Register.

**Other issues**

The members of a the governing body of an HE institution as its 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. In deciding whether or not to accept funding from any source, it would be incumbent on the charity trustees to ensure that, in accepting any terms and conditions attached to the funding, they were acting in the interests of the charity, when all factors are considered.

OSCR
4 March 2013