

Scottish developments

Gillian Donald assesses OSCR's rolling review.

Overview

At the end of October 2008, the Office of the Scottish Charity Regulator (OSCR) finally published its report on phase 1a of its rolling review, a process which had commenced in the autumn of 2007.

The reason for the delay was that this phase focused on some of the key risk areas, including assessing the charitable status of 11 fee-paying schools in Scotland. These weren't the only charities under the microscope – it looked in total at 30 charities, encompassing also residential care charities, museums and a number of randomly selected charities.

Most passed the test, as would be expected. However, there were 11 failures and OSCR's report picks up on some key themes that had been identified as risky in the pilot phase, and where one or more of the charities tested failed:

- Four independent schools;
- Six where it was possible for charitable property to be applied for non-charitable purposes; and
- One was not independent of ministerial control.

For each of those that have failed the test, OSCR has issued the charities with formal directions with timescales of up to three years to make the necessary amendments.

The real issues have arisen with the independent schools.

Independent schools

When we think of fee-paying schools, we tend to think of the mainstream schools where the main barrier to entry is ability to pay. However, there are many specialist schools that charge fees too, and OSCR included some of these in its sample of schools tested, including schools such as Donaldson's, which exists specifically to educate deaf children, and where the fees are paid entirely by the local authority or Scottish government and access is based on assessment of need. Within the group of eleven schools tested, OSCR included five such schools, as well as what we would think of as the mainstream fee paying schools.

OSCR's report gave some more detail on how it arrived at its judgement. In summary, it states that it considered the following:

- Transparency of fees and facilitated access;
- Fees and charges levied compared to the rest of the independent sector and state sector; and
- The extent of other benefits provided by the school for which it does not charge.

OSCR considered the number of pupils in receipt of financial assistance, then specifically means-tested support, expressing them as a percentage of the school roll as well as the total income of the charity. Due to the range of schools that were included, it's clear that some of them would pass these tests, such as the state-sponsored schools. However, it's more interesting to consider the mainstream schools between those that passed and failed, and to analyse in more detail how they compare.

Criteria	George Heriot's	Gordonstoun	St Leonards	Lomond	Merchiston Castle	Hutcheson's
Total fee remission						
% school roll	12	32	3	17.5	41	2.8
% school income	9	11.5	5.5	18.5	9	2.1
Means tested remission						
% school roll	8	13.4	1	1	3.7	2
% school income	7	8.8	0.5	1	1.5	2.6
Passed?	✓	✓	✗	✗	✗	✗

From the table above you can see that there is a range of facilitated access for pupils that can't afford to pay full fees, and there is no discernable pattern between those schools that passed and those that failed. However, you can also see that the only two schools that passed are those where there are significant means tested benefits provided, whereas those that failed feel significantly less financial pain. So it's clear that the means tested fee remission is a key aspect, and we can see what is definitely acceptable or definitely not acceptable. The big, unanswered question remaining is where is the cut-off applied? OSCR will not be drawn on exact percentages, instead stating that the greater the fee, the greater the required facilitated access.

It's also interesting to note that in considering other, non-financial benefits provided by the school, OSCR has considered only those that are in furtherance of its education objective, ignoring such aspects as opening up of sports facilities in the evenings etc.

Other charities

Six charities were judged to have a problem with their constitution which makes it possible for their property to be used for purposes that don't meet the Scottish definition of charity. This is due to the way in which charity and charitable is defined by the different UK jurisdictions and the tax authorities.

There were also some charities where their activities had drifted away from the charitable objectives stated in their constitutions. Not that they were not carrying out charitable activities, but that they were not quite consistent with those stated in their founding documents. This really highlights the need for charity boards to be aware of their charitable objectives and to ensure that they continue to be relevant to what the charity is actually doing.

What happens next for those that failed?

In each of the cases of failure, OSCR's directions take a three stage approach:

- The charity will confirm within three months to OSCR that it intends to comply with the direction issued;
- Within a further nine months, the charity must submit a plan to OSCR detailing the

changes planned to enable it to meet the charity test; and

- These changes should be made effective within a further two years, allowing three years in total for the charity test to be met.

Many fee-paying schools recognise that they are in the risk category and are taking steps to ensure they meet the public benefit test. This was acknowledged by OSCR in its report, which may be why it is allowing them some time to remedy the position.

The next stage

As part of the next stage of the rolling review, OSCR has identified a new risk in the form of charities which conduct no activity and intends to look in more detail at those charities with income or expenditure of £nil. A further intention is to expand the work currently undertaken with umbrella organisations. Starting in January, OSCR will consider independent schools (again), care homes, universities, NHS endowment funds, student associations and unions, and charities with income or expenditure of £nil for two or more consecutive years.

Conclusion

One of the main recommendations coming out of the rolling review is the importance of an up-to-date constitution which should be reviewed and updated regularly to ensure that it complies with current legislation and the charity's activities. OSCR also emphasises the importance of ensuring that the trustees annual report, details activities undertaken and demonstrates how public benefit is met.

The report also highlights the benefits of working with an umbrella organisation to agree model constitutions. However the real message coming out of this report is for those mainstream independent schools that are at risk of failing, means tested bursaries are crucial to enable you to pass the test.

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