

# Briefing Paper: Top 5 tips when thinking about charitable status

## 1 Charity test

The Charities and Trustee Investment (Scotland) Act 2005 (the "2005 Act") sets down a charity test that a body must meet in order to be registered as a charity in Scotland. The test requires that the body must only have charitable purposes and provide a public benefit in Scotland or elsewhere.

The 2005 Act contains a list of charitable purposes for bodies to choose from, the most relevant to Sports Governing Bodies ("SGBs") are usually:

- to advance public participation in sport; and/or
- to provide recreational facilities, or organise recreational facilities, with the object of improving the conditions of life for the persons for whom the facilities or activities are primarily intended.

Other charitable purposes that may also apply are to advance education or health or promote equality and diversity.

When applying this test, bodies should think about the following:

- if there is any private benefit from activities;
- if there is any disbenefit to the public; or
- if there are any unduly restrictive conditions on assessing the benefit provided by the body.

Reasons for failing the charity test include the following:

- the constitution of the proposed charity allows its property to be distributed or applied for non-charitable purposes;
- the constitution expressly permits government ministers to control its activities; or
- the proposed charity is a political party or one of its purposes to advance a political party.

When considering charitable status for SGBs, consideration needs to be given to the performance activities of the SGB, as this is often perceived as private benefit. It is not completely forbidden for charities to offer any private benefit, but this is viewed strictly and should not outweigh any public benefit.

'Private benefit' is where individuals receive a benefit from a charity, other than as a member of the public. The Office of the Scottish Charity Regulator ("OSCR") will look at the private benefit with reference to the whole benefit provided by the SGB. The SGB will only pass the charity test if the private benefit it provides is a necessary result or by-product of the SGB's activities and not an end in itself.

## 2 Structure

Charities can be set up in a variety of different types of legal forms. The two most common types of charity structures for SGBs are companies limited by guarantee ("CLG") and Scottish Charitable Incorporated Organisations ("SCIO").

A SCIO is a corporate body which has a separate legal personality and this structure is only available to charities incorporated within Scotland. It is neither a company nor a trust and is solely regulated by the OSCR and must meet OSCR's requirements for charitable registration. Members of a SCIO also enjoy limited liability in the same way as limited companies.

Although all SCIOs must technically have both members and charity trustees, it is possible for SCIOs to maintain a one tier approach, where the charity trustees and members are the same people. Alternatively, a two tier approach is available which involves separate charity trustees and members.

A CLG is a separate legal entity with separate legal personality as distinct from its directors and its members. The CLG has no shareholders and does not distribute profit.

Its members' liabilities are limited to a guaranteed sum – usually a nominal £1. A charitable CLG must comply with both the 2005 Act and the Companies Act 2006.

Until the introduction of the SCIO, the CLG model was the most attractive option for charities wishing to enjoy the benefits of limited liability, and organisations found that the administrative burden associated with operating as a company could be easily managed.

There are also a number of charities set up as unincorporated associations. Being unincorporated carries certain risks as the charity does not have a legal personality separate from its members and charity trustees.

### 3 Application

To apply for charitable status, the following documents are required:

- an application for charitable status form;
- trustee declaration forms signed by the proposed charity trustees (the current directors of the company);
- memorandum and articles of association for a CLG or constitution for a SCIO;
- business plan detailing the activities of the proposed charity; and
- a company incorporation form, if incorporating a CLG.

### 4 OSCR regulation

In terms of regulatory requirements which come with obtaining charitable status, organisations must keep accounts and submit these annually to OSCR, together with an annual return and OSCR's consent must be obtained when making certain changes to the organisation.

Charities are required to obtain OSCR's consent in relation to a number of actions set out in the 2005 Act. If the charity was to:

- amend its constitution or articles of association, which would amend its charitable purposes;
- amalgamate with another body;
- wind up or dissolve; or
- apply to the court in relation to any of the above actions,

it would need to apply to OSCR for its consent at least 42 days before the proposed action.

OSCR has powers under the 2005 Act where it appears to OSCR that there has been misconduct in the administration of a charity. Accordingly, charities should ensure that effective governance policies and procedures are in place. In particular, OSCR has the power to suspend any person in the management or control of a charity.

### 5 Charity funds

Benefits of acquiring charitable status include increased funding options as some organisations find that becoming a charity opens up new funding opportunities for some funders who only consider charities. Also, there are tax reliefs available for charities, details of which should be obtained from HMRC, and specific advice from tax specialists should be sought.

As well as considering the tax implications of charitable status, SGBs should gain an understanding of any different accounting requirements of OSCR. In particular, consideration should be given to the difference between any restricted and unrestricted funds within accounts and having a good reserves policy, which will help show donors and beneficiaries are managing the SGB's money.

## Get in touch

SGBs can access the **sportscotland** legal expert resource helpline by email at [sportscotlandinfo@harpermacleod.co.uk](mailto:sportscotlandinfo@harpermacleod.co.uk) or by calling 0141 227 9333.