

[redacted]

3. Potential impacts for OSCR

The proposals are different for different sectors, and will have a differentiated impact within these sectors. There are a number of different issues for OSCR to consider. Some of the technical, non-controversial recommendations we would simply welcome, but others raise more challenging issues.

1. Potential undermining of the charity test:

Perhaps the most important issue is the way in which the Review differentiates between different kinds of charity. It implies that some charities are more “worthy” than others.

It might be argued that one of the strengths in the way charities are currently regulated is the simplicity of the regime. That is to say, there is one charity test, and to be a charity you must pass that test. Charitable status then largely grants access or eligibility to a range of special considerations in taxation or in funding. Although it can be argued that ruling on charitable status is one thing, and the question of financial treatment etc. a secondary issue (and not for the charity regulator), in practice the two issues are intertwined in the public’s mind and there is the potential to undermine confidence in the system if decisions about status are being ‘second guessed’ by third parties.

While the Review is at pains to state they are not questioning the charitable status of any of the organisations whose rates relief may be affected by the recommendations, there is a sense in which there is a *de facto* devaluing of the charity status of certain groups of charities that currently have charity status. Allowing the creation of a “two-tier” charity sector (and ultimately maybe more layers?), would be messy and could be damaging to the charity brand.

It is worth noting here, however, that this is not the first time that exemptions would be given to charities on a differentiated basis. For instance, the water exemption does not apply to all charities.

[redacted]

[redacted]

[redacted]

4. Next steps for OSCR

These proposals have significant implications for sections of OSCR's regulated community and there is already thinking going on in these sectors. For instance, SCVO quickly welcomed the proposals on ALEOs and private schools. We have also received correspondence from SCIS (attached). It is also clear that this issue will have a high profile, and there is a significant possibility that we will have to respond to media requests for an extended period. The Third Sector team in Scottish Government will also want to hear our reaction and thoughts on this.

We should:

- a) Be clear what our position (if any) is on these recommendations
- b) Develop our external communications messages
- c) Decide how we want to engage with SG and others on this

Board members are invited to note and comment on the contents of this paper and give a steer as to the development of this work.

POLICY FILE NOTE:

DATE:	7 November 2017
AUTHOR:	[redacted]
SUBJECT:	The Barclay Review

Background

In 2016, Kenneth Barclay was asked to chair a Review into the non-domestic rates system in Scotland. The aim of the Review was to try to reform the system in order to better support business growth and long-term investment. The Scottish Government welcomed the review and pledged to respond quickly. The Programme for Government announced on the 5 of September, a published implementation plan was promised by the end of 2017.

While there was a consultation as part of the Review, we did not submit a formal response, nor did we take part in any conversations around the Review. There was also very little discussion about the Review in the third sector.

In a statement to parliament on the 12 September 2017, Derek Mackay, Cabinet Secretary for Finance and the Constitution, accepted a number of the recommendations, declined a few, and promised additional consultation on the others. The latter included all the recommendations that had the potential to impact on the charity sector.

As part of this consultation, we met with [redacted], [redacted] and [redacted] from SG on the 3 November.

The discussion

After a general discussion of their role in this process, we concentrated on discussing the issues raised in the materials that we had produced prior to the meeting and had shared with them. Below, we summarise the key themes discussed during the review

The Review was required to come up with a **revenue neutral** position. [redacted]

We talked a lot about the general issue of the potential undermining of the **charity test** if the recommendations were to go through as is. They could understand this position. We discussed the fact that there were precedents here, but agreed that the Water Exemption was not a perfect comparison, as it was more related to income than type of charity.

[redacted]

We talked about the **reviews** that we have done both of private schools and ALEOs, and that fact that, in a sense, they had been put under much more scrutiny than many other charities and that, ultimately, they had passed the charity test. This might tend to reinforce the fact that this kind of targeted change could undermine the charity test.

We discussed the fact that the **breadth and depth of charities on the Register** meant that, while the separating out of ALEOs and Private Schools on the surface had a logic, there would be many other charities currently on the register that might muddy that somewhat. [redacted]

There was a lot of positive discussion around how the changes might affect **private schools** that would not qualify for **disability relief**, but that did cater to specific marginalised groups and individuals. We all agreed that that would be a small number that could be easily found.

[redacted]

[redacted]

[redacted]

From: [redacted]
Sent: 11 January 2018 10:45
To: [redacted]; [redacted]
Subject: FOI

From: [redacted]
Sent: 27 September 2017 15:47
To: [redacted]
Cc: [redacted]; [redacted]; [redacted]; [redacted]; [redacted]
Subject: RE: Advice request from First Minister - Barclay Review
Importance: High

[redacted]

I have now spoken to OSCR who have been able to provide some of the information you have requested.

In terms of the accounts [redacted], you will be able to find the income and expenditure information for each school on their register entry:

<https://www.oscr.org.uk/public/search-scottish-charity-register>. [redacted]

In terms of the wider benefits of charitable status that independent schools enjoy, OSCR cannot provide information about the value of rates relief to each independent school and we therefore have no way of knowing what proportion of that wider benefit relates to rates relief. OSCR have, however, confirmed that rates relief is likely to be the most significant relief to most, if not all, independent schools. Some schools will also benefit from gift aid on donations (not fees), from corporation tax exemptions to varying degrees, and VAT reliefs. Decisions on awarding such reliefs are a matter for HMRC on the basis of reserved finance legislation. You would therefore need to speak to the schools directly to ascertain that level of information.

[redacted]

OSCR also share our concerns that the independent school [redacted] recommendations undermine the integrity of the charity test and will lead to a 2 tier charity system. [redacted]

[redacted]

[redacted]

[redacted]

OSCR would be keen to engage with SG further on these issues and I know David Robb (OSCR CE) has emailed Donna offering a meeting to explore their concerns in more detail. [redacted], you may wish to consider whether an early meeting, before any decisions are taken, would make sense.

[redacted]

Happy to discuss

Thanks

[redacted]

[redacted]
Charity Law and Volunteering Team
Third Sector Unit
0131 244 [redacted]

From: [redacted]
Sent: 26 September 2017 14:45
To: [redacted]; [redacted]
Cc: [redacted]; [redacted]
Subject: RE: Advice request from First Minister - Barclay Review

[redacted]

From: [redacted]
Sent: 26 September 2017 14:34
To: [redacted]; [redacted]
Cc: [redacted]; [redacted]
Subject: RE: Advice request from First Minister - Barclay Review

[redacted]

From: [redacted]
Sent: 26 September 2017 12:04
To: [redacted]
Cc: [redacted]; [redacted]; [redacted]
Subject: RE: Advice request from First Minister - Barclay Review

[redacted]

From: [redacted]
Sent: 26 September 2017 11:58
To: [redacted]
Cc: [redacted]; [redacted]; [redacted]
Subject: RE: Advice request from First Minister -Barclay Review
Importance: High

Hi [redacted]

Thanks for sending this through.

[redacted]

[redacted]

In terms of the specific request for accounts -OSCR will have the accounts but I am not entirely sure they will be able to share them with us if they haven't been published by the charity on the register (not all include a link on their register entry. It looks Fettes are the only school on your list that have published theirs). I can ask OSCR though.

[redacted] I am not sure if you will be able to work out the impact of removing their rates relief from their account information. It might be easier and more accurate for [redacted] to request the information from the schools directly via SCIS. [redacted]

We would appreciate having sight of the draft advice to FM before it goes.

I will contact OSCR now and get back to you as soon as I can.

Thanks

[redacted]

[redacted]
Charity Law and Volunteering Team
Third Sector Unit
0131 244 [redacted]

From: [redacted]
Sent: 26 September 2017 11:02
To: [redacted]
Subject: FW: Advice request from First Minister - Barclay Review
Importance: High

[redacted]

Thanks,

[redacted]
[redacted]

From: [redacted] **On Behalf Of** First Minister
Sent: 25 September 2017 16:15
To: [redacted]; Robertson FMG (Fiona)
Cc: DG Education, Communities & Justice; DG Scottish Exchequer Mailbox; DG Economy; Cabinet Secretary for Finance and the Constitution; Deputy First Minister and Cabinet Secretary for Education and Skills; McAllister, C (Colin); McCaig C (Callum); Lloyd E (Elizabeth); [redacted]; MacKinnon D (Donna)
Subject: Advice request from First Minister - Barclay Review
Importance: High

[redacted], Fiona,

The First Minister has requested advice on the impact of implementation of the Barclay Review's recommendation on private schools.

- [redacted]

I would be grateful if we could have this advice by 1700 on Thursday 28 September.

Happy to discuss further.

Kind regards

[redacted]

Ext [redacted]

[redacted]

Operations Manager and Private Secretary to the First Minister

The Scottish Government

5th Floor | St Andrew's House | Regent Road | Edinburgh | EH1 3DG | T: 0131 244[redacted] | M: [redacted]



Office of the First Minister of Scotland

FirstMinister.gov.scot

Prìomh Mhinistear na h-Alba

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[redacted]

From: Deputy First Minister and Cabinet Secretary for Education and Skills
Sent: 05 October 2017 18:07
To: Cabinet Secretary for Finance and the Constitution; Clarke R (Richard)
Cc: Cabinet Secretary for Finance and the Constitution; Ingebrigtsen R (Ross); McAllister C (Colin); Nicolson S (Stuart) Special Adviser; [redacted]; [redacted]; [redacted]; [redacted]; Robertson FMG (Fiona); [redacted]; News Desk; Communications Economy; Communications DFM & Education; [redacted]; [redacted]
Subject: Re: Lines to clear - Private school business rates - 5pm

DFM has now also cleared this.

Thanks
[redacted]

Sent from my BlackBerry 10 smartphone.

From: Cabinet Secretary for Finance and the Constitution
Sent: Thursday, 5 October 2017 16:54
To: [redacted]; Deputy First Minister and Cabinet Secretary for Education and Skills
Cc: Cabinet Secretary for Finance and the Constitution; Ingebrigtsen R (Ross); McAllister C (Colin); Nicolson S (Stuart) Special Adviser; [redacted]; [redacted]; [redacted]; [redacted]; Robertson FMG (Fiona); [redacted]; News Desk; Communications Economy; Communications DFM & Education; [redacted]; [redacted]
Subject: RE: Lines to clear - Private school business rates - 5pm

[redacted],
Mr Mackay is content for his part.

[redacted] | Private Secretary (Depute) | Cabinet Secretary for Finance and Constitution
Tel. 0131 244 [redacted] / 0300 244 [redacted] | Blackberry: [redacted]

Mail: 4N.08 | St Andrews House | Regent Road | Edinburgh | EH13DG

All e-mails and attachments sent by a Ministerial Private Office to another official on behalf of a Minister relating to a decision, request or comment made by a Minister, or a note of a Ministerial meeting, must be filed appropriately by the recipient. Private Offices do not keep official records of such e-mails or attachments. Thank you.

From: [redacted]
Sent: 05 October 2017 16:15
To: Deputy First Minister and Cabinet Secretary for Education and Skills
Cc: Cabinet Secretary for Finance and the Constitution; Ingebrigtsen R (Ross); [redacted]; McAllister C (Colin); Nicolson S (Stuart) Special Adviser; [redacted]; [redacted]; [redacted]; [redacted]; Robertson FMG (Fiona); [redacted]; News Desk; Communications Economy; Communications DFM & Education; [redacted] [redacted]
Subject: Lines to clear - Private school business rates - 5pm

[redacted],

We have been asked by TES Scotland if we can confirm whether or not private schools are going to be expected to pay business rates in full going forward.

Officials and Spads have cleared the below response, could you confirm whether Mr Swinney is content?

A Scottish Government spokesperson said,

“The Scottish Government will engage further on the recommendation to levy business rates on independent schools and will confirm the outcome later this year.”

Background

The Barclay review of business rates, published on 22 August 2017 recommended that independent schools, that are registered charities should be brought into line with State schools and pay business rates.

Thanks

[redacted]

News Desk | Communications

Tel – 0131-244-[redacted] | [redacted][@gov.scot](mailto:[redacted]@gov.scot)

Meeting Briefing Request Form

Title of Meeting:	SG/OSCR quarterly catch up
Date and Time:	4 December 2017 – 11.00 am to 12.30 pm
Where:	OSCR, Quadrant House, 9 Riverside Dr, Dundee DD1 4NY
Purpose:	OSCR are a Non Ministerial Department and part of the Scottish Administration. The Charity Law and Volunteering team are responsible for maintaining the relationship between OSCR and the Scottish Government. We meet on a quarterly basis to catch up on key issues. This is our final catch up of 2017 and will provide you with the opportunity to meet with OSCR's Senior Management Team.
Attendees: (Name, role and any relevant background)	[redacted]
Key Points:	<p>Agenda</p> <p>a. [redacted]</p>

[redacted]

5. Barclay review non-domestic rates
[redacted] They are aware that Mr MacKay has rejected the recommendation in relation to ALEOs and a decision will be made on independent schools as part of the implementation plan that is due before the end of the year. We may wish to ask OSCR what their position would be and how they would plan to respond if the school recommendation is accepted.

6. [redacted]

[Redacted content]

Any Sensitivities: [redacted]

Agreed Actions:
(Lisa to complete)

CHARITY LAW AND OSCR

The Charities and Trustee Investment (Scotland) Act 2005 ('the 2005 Act') provides the legislative framework for charity regulation in Scotland; and sets out the Scottish Charity Regulator's (OSCR) powers and functions.

Role of the Office of the Scottish Charity Regulator

OSCR became a Non Ministerial Department in April 2006 and reports to the Scottish Parliament. OSCR is the independent regulator and registrar for over 24,000 Scottish charities including community groups, religious charities, schools, universities, grant giving charities and major care providers.

OSCR was created to be an independent, proportionate, transparent and fair regulator. Its main functions are to:

- Determine whether bodies are charities.
- Keep a public Register of charities.
- Encourage, facilitate and monitor compliance by charities with the provisions of the 2005 Act.
- Identify and investigate apparent misconduct in the administration of charities and to take remedial or protective action in relation to such misconduct.
- Give information or advice, or to make proposals, to Scottish Ministers on matters relating to OSCR's functions.

The Charity Test

To be a Scottish charity or charity registered in Scotland the organisation must pass the charity test and be entered in the Scottish Charity Register. The Charity test is set out in the 2005 Act. To pass the charity test an organisation:

- Must have **only charitable purposes** and;
- Its activities must provide **public benefit** in Scotland or elsewhere.

In addition, an organisation will fail the charity test if: its governing document allows its assets to be distributed or applied for non-charitable purposes; its governing document expressly permits government Ministers to direct or control its activities; or it's a political party or one of its purposes is to advance a political party.

OSCR's activity on fee-charging schools

Since 2007 OSCR has reviewed the charitable status of 52 schools on the Scottish Charity Register. As a result these charities have been subject to more rigorous and in-depth scrutiny and action than any other group of charities on the Register.

The review found that:

- 40 of the schools met the charity test on initial review
- 10 failed the charity test, in 9 cases this was because the fees they charged unduly restricted access to the educational benefits they provide.
- two reviews were suspended because of other issues within the charities.

Where schools failed the charity test, OSCR took action to enforce compliance, directing the 10 charities to take steps to meet the charity test within a fixed timescale or face removal of charitable status.

All 10 charities took action to meet the test within the required timescale, are now compliant with the requirements of charity law and continue to have charitable status. The actions the charities took included increases in the support they provided for those

unable to pay the fees and increasing the amount of educational benefit provided without charge.

[redacted]

[redacted]
Charity Law and Volunteering Team
[redacted]

