St Margaret's Children and Family Care Society: Report of the Office of the Scottish Charity Regulator (OSCR) under section 33 of the Charities and Trustee Investment (Scotland) Act 2005, 5 March 2013

St Margaret's Children and Family Care Society (the charity) is a voluntary adoption agency connected with the Roman Catholic Church. This was a request for a review of the OSCR's finding that it failed the charity test. The OSCR found the charity did not provide a public benefit because the way that it provided a benefit involved unlawful discrimination which caused detriment to the public and to particular groups of people. The overall effect was that this discrimination outweighed the other positive effects of the charity’s work. In addition, the OSCR found that access to the benefits provided by the charity was unduly restricted.

The original investigation into the charity was triggered by a complaint to the OSCR from the public. The original finding agreed with the complainant that the charity was operating in breach of the Equality Act 2010 (UK) (the Act) by unlawfully discriminating against same sex couples. The charity’s preferred criteria prioritised couples who had been married for at least two years. Since marriage was not available to same sex couples this constituted direct discrimination. The OSCR found that the exceptions in the Act for discrimination by charities and religious bodies did not apply to the charity. The OSCR directed that the charity alter its external and internal guidance and procedures so that discrimination no longer took place. On 11 February 2013, the charity requested a review of the OSCR’s decision. This review decision on 4 March 2013 confirmed the original decision.

The original decision

The charity was established in 1955, and first registered as a charity in 1999. Its objects, as set out in its memorandum of association, include:

The society is established to promote (irrespective of creed) the welfare of children, whose interests are paramount, to foster the stability of family relationships and to assess the suitability of applicants as adoptive parents all in accordance with the teachings of the Catholic Church....

The objects had been amended on 23 October 2008, following consent by the OSCR on 9 October 2008. The OSCR’s consent process at the time involved no examination of the charity’s activities and did not imply any consideration or approval of these.

The charity’s main activity is assessing and approving potential adoptive parents under sections 28 and 29 of the Adoption and Children (Scotland) Act 2007 (the 2007 Act). There is a rigorous process of assessment for adoptive parents, with a ‘sift’ of initial enquirers followed by a full assessment for those passing the ‘sift’. Those approved by the charity’s Adoption Panel are presented to adoption agencies (usually Scottish local authorities) for matching with the agency’s potential adoptees. An inter-agency fee is paid to the charity when a placement occurs. The charity also provides post-adoption support for adoptive parents – a significant part of its work, as the charity is particularly involved with adoption of ‘hard to place’ children, where more support is needed.

The chair of the charity trustees is a Roman Catholic cleric and Canon lawyer. There are 7 other trustees. The president and vice-presidents of the charity (who are not charity trustees) are the Archbishop and Bishops of the contributing Dioceses. Most of its income comes from inter-agency fees, but about one-quarter is provided from the Archdiocese of Glasgow, the dioceses of Paisley, Galloway and Motherwell, and from donations from local parishes.

The review focused on the charity’s criteria for adoptive couples. There were ‘preferred criteria’ in assessing which enquirers should go forward for full assessment as adoptive parents. These gave greater priority to prospective adoptive parents who were:
a) Members of a couple;
b) Catholic;
c) Married (for at least two years);
d) Others who wish to adopt within the framework of the Roman Catholic faith.

Lower priority was accorded to:

a) enquirers who have been married for less than two years;
b) couples in civil partnerships;
c) single people;
d) married couples who did not wish to adopt within the Roman Catholic faith.

The OCSR’s view was that the charity’s ‘preferred criteria’ result in less favourable treatment to people sharing the following protected characteristics under the Act:

a) Sexual orientation: since marriage (as opposed to civil partnership) is not available to gay or lesbian couples the less favourable treatment for unmarried couples amounts to direct discrimination against same sex couples on the grounds of their sexual orientation.
b) Religion or belief: on the face of it, the less favourable treatment which the charity’s guidelines suggest it gave couples who did not wish to adopt within the Roman Catholic faith (as opposed to Roman Catholic couples or those wishing to adopt within the framework of that faith) amounted to direct discrimination on the basis of religion. (This finding was based on what the OSCR admitted was ‘limited evidence’.)

Neither of the Act’s two relevant exceptions (for charities and religious bodies) applied to the charity.

**Charity exception did not apply**

Section 193 of the Act allows a charity to restrict the benefits it provides to people with a particular protected characteristic (in this case non-Catholics or gay or lesbian couples) if:

a) it is acting in pursuance of its charitable instrument (constitution); and
b) it is a proportionate means of achieving a legitimate aim.

The OCSR’s view was that in operating its preferred criteria the charity was acting in pursuance of the charitable purposes set out in its constitution (as amended), in that it was ‘…assessing the suitability of applicants as adoptive parents, all in accordance with the teachings of the Catholic Church’. The question therefore became: what legitimate aim was the operation of the preferred criteria intended to achieve, and were the preferred criteria a proportionate means of achieving this aim? The OSCR did not agree with the charity’s argument that the operation of its preferred criteria was in the best interests of adopted children. Whilst the charity did very good work in placing hard-to-place children, OSCR found (at page 7 of its report):

…the charity’s success in these respects does not in itself prove that the children’s best interests are being served by the operation of the preferred criteria. Other factors in the way the charity carries out the full assessment process or its provision of support in placement may also contribute. Increasing the number of successful placements would be a legitimate aim, but it is not clear that the operation of the preferred criteria, and removal of homosexual potential adoptive parents from consideration, is actually a means of achieving this, let alone a proportionate means. …OSCR has also considered evidence about the wider context of adoption in Scotland. Our understanding is that nationally there is a mismatch between the needs of children awaiting adoption (with the majority of those on the National Adoption Register being aged over 4) and the preferences of approved potential adoptive parents (the majority of whom wish to adopt a child under 4). Clearly, any action which was aimed at better
matching the needs of children with the supply of potential adopters willing to take them would be in the best interests of those children and a legitimate aim. We note also that evidence submitted in the Catholic Care case in England and Wales suggested that same sex couples were more likely than heterosexual couples to consider adopting harder to place children such as sibling groups and older children. This does not tend to support the case that the best interests of such children are best served by the operation of the preferred criteria in removing same sex couples from consideration as potential adoptive parents. While acting in the best interests of children by increasing the number of successful placements would be a legitimate aim there is no clear evidence that the operation of the preferred criteria is a means of achieving this aim, or that it is a proportionate means of doing so.

The OSCR also rejected the charity’s arguments that its preferred criteria for adoption were fulfilling the requirement of adoption law in Scotland (section 14 of the 2007 Act), which required the adoption agency to take into account the religious persuasion of a child. In this respect, the OSCR found (at page 8 of its report):

Religious persuasion is only one factor among many which Section 14 of the 2007 Act says adoption agencies should take account of in order to safeguard and promote the welfare of the child in coming to a decision on adoption. Another factor which must be taken into account is the ‘value of a stable family unit’. Here however the charity has failed to recognise that a stable family unit is not necessarily only a married couple. The 2007 Act makes clear that unmarried couples, couples in civil partnerships or indeed single people may adopt. The charity is not complying with its statutory duty by its use of the preferred criteria and by its prioritising of religious persuasion above other relevant factors. It is not clear, in any case, that the children who are placed for adoption with parents approved by the charity are always or exclusively of a Roman Catholic persuasion.

The charity’s final argument was that its preferred criteria were in accordance with religious tradition and Roman Catholic doctrine. Whilst agreeing that the preferred criteria were in line with doctrine, the OCSR considered (at page 8 of its report):

…that religious belief alone cannot provide a lawful justification for discrimination on grounds of sexual orientation in the delivery of a public service such as the operation of an adoption agency.

Therefore, the charity exception did not apply because the operation of the preferred criteria was not a proportionate means of achieving a legitimate aim in furtherance of the charity’s purposes.

Religious exception did not apply

Schedule 23 of the 2010 Act provides an exception to specified Parts of the Act for organisations which have certain purposes relating to religion or belief. An organisation which has such a purpose is permitted to restrict access to participation in activities or the provision of goods or services on the basis of the protected characteristic of sexual orientation where it is necessary to do so:

a) to comply with the doctrine of the organisation, or
b) to avoid conflict with strongly held convictions of a significant number of a religion’s followers.

The charity took the view that the restrictions involved in the operation of the preferred criteria fell under this exception, since:

a) its purposes fell under one or all of the headings listed in the 2010 Act;
b) the preferred criteria comply with the doctrine of the Roman Catholic Church, of which they saw the charity as a part.

The OSCR agreed that the preferred criteria fell within the doctrine of the Roman Catholic Church, and that their application brought it potentially within the scope of the religious exception. The OSCR found, however (at page 9 of its report):

…whilst the religious exception may apply where organisations are conducting activities such as acts of worship or devotion, it is unlikely that it will apply where a religious organisation is providing services to the public or carrying out functions of a public nature. In terms of the relevant case law, religious belief by itself cannot justify discrimination on grounds of sexual orientation when an organisation is providing a public facing service, such as the provision of a voluntary adoption agency, which is the charity’s function in terms of adoption law. Our view therefore is that given the nature of the public facing service provided by the charity they cannot rely upon the religious exception to justify their use of the preferred criteria in respect of sexual orientation.

Therefore, the religious exception under the Act did not apply to the charity. The OSCR concluded that the operation of the charity’s preferred criteria for adoption constituted unlawful discrimination in respect of same sex couples. The OSCR’s report said (at page 10):

This being the case, the prevention of access of same sex couples to the benefit that the charity provides in terms of assessment as potential adoptive parents is unduly restrictive. There is also disbenefit in that the operation of the preferred criteria necessarily means that persons in same sex couples who might be suitable adoptive parents and serve the best interests of children are simply not considered by the charity and may be dissuaded by such discrimination from entering the adoptive pool. We therefore consider that the charity places undue restriction on access to the benefit that it provides, and so fails the charity test.

The OSCR directed that the charity take steps to meet the charity test, as required under section 30(1)(a) of the Charities and Trustee Investment (Scotland) Act 2005.

(The first instance decision is available at http://www.oscr.org.uk/media/386066/2013-02-12_st_margaret_s_s33_report_updated_pdf.pdf)

**The review decision**

The charity’s review request set out a number of grounds challenging the OSCR’s decision, including:

a) that OSCR was in error in its application of the exceptions in the 2010 Act;
b) that the direction contravenes the charity’s rights to freedom of thought, conscience and religion under the European Convention on Human Rights (ECHR);
c) that adoption law requires adoption agencies to have regard to the religious background and persuasions of prospective adopters and adoptive children;
d) that OSCR had not considered the effect on other charitable adoption agencies of having dissociated themselves from the Roman Catholic Church.

OSCR found on review:

a) that the charity discriminated unlawfully, in breach of the Equality Act 2010;
b) that the charity discriminated directly on grounds of religion or belief and on the ground of sexual orientation;
c) that the exception provided for charities under the Equality Act 2010 did not apply to the charity or to the ways in which the charity discriminated;
d) that the ECHR rights in regard to religion did not apply in the case of the charity, which was not a church or a religious community, but rather an adoption agency;

e) that the exception provided for religious bodies under the Equality Act 2010 did not apply to the charity as its purposes did not fall within this exception.

The Review Panel found that the charity’s benefits to the community were substantial, but that these were outweighed by the ‘disbenefits’ which the application of its preferred criteria brought about. Therefore, the charity failed the charity test. The charity has the right to appeal the decision to the Scottish Charities Appeal Panel.