

Consultation Response

Review of Charity Regulation

July 2024

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful, and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

We welcome the opportunity to consider and respond to the Scottish Government consultation: Review of Charity Regulations.¹ We have the following responses to put forward for consideration.

Questions

1. Should there be a review of charity regulation?

Yes

2. Please explain why you think there should or should not be a review of Charity regulation.

We continue to be fully supportive of a comprehensive review of Charity regulation in Scotland. We responded to the Scottish Government's consultations on proposed changes to Scottish charity law in 2019² (Consultation on Scottish Charity Law) and in 2021.³ (Strengthening Scottish Charity Law Survey), and engaged fully with the consultative processes during the passage of the Charities (Regulation and Administration)(Scotland) Act 2023.

Throughout, we have argued for a comprehensive review of all aspects of charity regulation, recognising that numerous improvements could be made to the working of the system introduced by the Charities and Trustee Investment (Scotland) Act 2005, now almost two decades ago. Valuable amendments to the 2005 Act have been made, in particular by the Public Services Reform (Scotland) Act 2010 and now the 2023 Act, but the focus of the 2023 amendments was on the accountability of charities and the powers of OSCR as regulator, and what is needed now is a wider review taking full account of the accessibility and workability of the system for charities.

¹ [Review of charity regulation - Scottish Government consultations - Citizen Space](#)

² Scottish Government, Consultation on Scottish Charity Law, 2019 <https://consult.gov.scot/local-government-and-communities/scottish-charity-law/>

³ [21-02-19-char-strengthening-scottish-charity-law-survey.pdf \(lawscot.org.uk\)](#)

We welcomed the Minister's commitment to a wider review made during the passage of the 2003 Act and we are concerned, as previously, that the opportunity should not be lost for a full review of the system from the perspective of charities.

3. If a review of charity regulation is undertaken, which of the following should be the purpose of the review (choose one):

- To assess the effectiveness of current charity regulation in meeting the future needs of the sector
- To review the Charities and Trustee Investment (Scotland) Act 2005 - exploring if the Act is doing what it set out to do and if any changes are required
- Don't know
- Other – please specify

Please give us your views:

We have chosen the first option (see our response at para 2 above), but this will involve a full review of Part 1 of the 2005 Act and its associated secondary legislation, since that is where the bulk of charity regulation in Scotland is to be found. We understand that the review is not concerned with Part 2 of the 2005 Act, which deals with fundraising by the wider class of 'benevolent bodies' but which has been only partly brought into force.

4. Do you think you or your organisation will have capacity to contribute views to a review process in the next 12 months?

Yes

5. If a review of charity regulation is conducted, what topics should it cover and why?

We would reiterate our previous suggestions that the main topics that a review of charity regulation should cover are:

The charity test (incorporating 'charitable purposes' and 'public benefit'): the charity test is central to the operation of the charity regulation system – only bodies which meet the charity test qualify as charities for the purposes of the system; a comprehensive review should include the test to ensure that it remains accessible to new applicants and generally fit for purpose.

Winding up and dissolution: readily workable arrangements for winding up and dissolution are an essential element of a mature system of charity regulation; the charity wind-ups and dissolutions which have occurred since the 2005 Act came into force have inevitably thrown up situations unforeseen by the drafters and exposed weaknesses in the original provisions which should now be addressed.

Powers of OSCR, including powers to propose transfer schemes and further powers for the appointment of charity trustees: the absence of regulations

allowing OSCR to propose transfer schemes for approval by the Court of Session deprives OSCR of a valuable form of intervention where there has been charity misconduct; fuller provisions for the appointment of charity trustees modelled on those of the Charity Commission in England and Wales would enable OSCR to assist charities in a wider range of situations than allowed for in the new provisions of the 2023 Act.

Reorganisation, including treatment of Royal charter and enactment charities and reorganisation of restricted funds: accessible reorganisation provisions are essential for charities in an era of rapid social change, particularly for small and medium-sized charities for which the cost of professional advice is a significant factor; a general review of the existing reorganisation provisions is required to address various technical obstacles to reorganisation.

SCIOs, including closer alignment with current company law and facilitation of conversion of unincorporated associations: since its introduction in 2011 the SCIO has proved a highly successful and popular legal form for charities, and is now the natural choice for most new bodies registering as charities; a number of technical shortcomings in the original provisions have, however, become apparent and a full review of the SCIOs regime, drawing on subsequent updates in company law, would ensure that it remains an optimum choice, especially for small and medium-sized charities; a significant weakness is the lack of a simple conversion route for charities formed as unincorporated associations, which deprives many existing small and medium-sized charities of ready access to the form.

Charity trustee duties, including statutory clarification of obligations regarding notifiable events: the successful operation of the charities sector depends in large part on the goodwill of volunteer charity trustees, many of them responsible for small charities with limited access to professional advice; section 66 of the 2005 Act seems to have been intended to provide a clear statement of the duties of charity trustees but does not in fact do so – for instance there is no express provision for the management of conflicts of interests in general, only a provision covering a very specific conflict situation unlikely to apply to most charities; a review of the 2005 Act provisions leading to a clear code of charity trustee duties would be of major assistance to charity trustees in the discharge of their responsibilities. Some further attention should also be paid to the provisions for charity trustee remuneration.

Audit and independent examination, including audit thresholds: the accounts audit and independent examination requirements are a significant feature of the compliance regime for charities and should be reviewed to ensure workability, again with small and medium-sized charities particularly in mind; an audit is an onerous obligation and audit thresholds should be kept under review to ensure that only those charities for which a full audit is appropriate are caught by the requirement; there are suggestions that the current thresholds may be inhibiting the growth of some charities as they seek to avoid the disproportionate costs of an audit.

6. What topics should it not cover, and why?

No topics should be excluded from the review. All topics of concern raised by stakeholders should be included. There has never been a comprehensive review of the system introduced by Part 1 of the 2005 Act and the opportunity for one now should not be wasted.

7A. Charitable purposes: Should this aspect of charity regulation be reviewed?

Yes

7B. Public benefit: Should this aspect of charity regulation be reviewed?

Yes

7C. Charity trustee duties: Should this aspect of charity regulation be reviewed?

Yes

8. Is there anything else you think should be included in a review of charity regulation?

As above, we would fully support a comprehensive review of the Charity Regulations.

9A. Should this technical topic be reviewed: Reorganisation of statutory and Royal charter charities?

Yes

9B. Should this technical topic be reviewed: Incorporation to a Scottish Charitable Incorporated Organisation (SCIO)?

Yes

9C. Should this technical topic be reviewed: Audit income thresholds?

Yes

10. Are there any other technical issues you think should be added to the technical workstream?

We suggest that further thought should be given to the distinction between 'technical' and 'non-technical'. We take it that 'technical' refers to legal technicalities, i.e., to problems arising from specific provisions of the 2005 Act which can be resolved by technical amendments which do not raise significant policy issues. The reorganisation of statutory and Royal charter charities, while undoubtedly raising difficult technical questions, might still be best tackled in the context of a wider review of the reorganisation provisions as a whole.

At the same time, a general review of the reorganisation provisions will be largely of a technical nature: the policy objective is clear – to improve the workability of the provisions for charities – but the current obstacles to reorganisation are technical and stand to be removed by technical solutions. Similar considerations apply in principle to the SCIOs regime. On this basis, we suggest that the following topics mentioned at para 5 above might be appropriately addressed within the technical workstream:

- Winding up and dissolution
- Reorganisation
- SCIOs.





For further information, please contact:

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