

**CHARITIES AND TRUSTEE INVESTMENT
(SCOTLAND) ACT 2005**

**The Scottish Charity Appeals Panel
Rules**

**Consultation Report and Analysis of
Responses**

**Scottish Executive
November 2006**

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Executive Summary

This Consultation Report consists of two main parts. The first part provides a summary and analysis of the written responses received by the Scottish Executive to the public consultation on the proposals for the Scottish Charity Appeals Panel (SCAP) and the rules governing them, to be made under schedule 2, paragraph 4 of the Charities and Trustee Investment (Scotland) Act 2005. The second part contains a summary of the Executive's finalised plans and outlines some of the changes we intend to make to the SCAP rules.

The Scottish Executive received 40 written responses to the consultation. 33 of these responses were on behalf of organisations and 7 were from individuals.

The majority of responses welcomed the proposals in the consultation paper and the intention of the Scottish Charity Appeals Panel to create a transparent process by which charities can be afforded their right to appeal.

The majority of responses supported the proposed set-up of an Appeals Panel secretariat, but concern was expressed throughout the legislative process, and reiterated during the consultation, that SCAP should be independent from Ministerial control. It was generally felt that in order to maintain the transparency of the panel there should be robust procedures in place and these should be publicly available. These should ensure there is no possibility for policy or operational intervention by Ministers or departmental staff and that the Panel is subject to investigation by the jurisdiction of the public service ombudsman and to Freedom of Information legislation

There was general agreement for the timescales proposed in the consultation document for the various stages of an appeal to the Panel, including a 28 day deadline for submission of supporting information by the appellant. There was also agreement that copies of all relevant documentation shall be submitted to both parties by the Panel

There was near unanimous support for either party's right to request an oral hearing with only two respondents suggesting that this should be a decision for the Panel.

Opinion was split amongst respondents regarding the consideration by the Panel of new evidence not previously available to OSCR when making its initial decision. Some felt that the Panel should be able to consider new evidence and others felt that they should not.

There was general agreement that the Panel should be able to award expenses in certain circumstances, although several respondents feared that the threat of costs being awarded against a charity may deter them from making an appeal because of the possible financial implications. Most respondents would like to be assured that any expenses or costs awarded will be 'reasonable' and take into consideration the penalised parties' ability to pay. Only two respondents did not feel that expenses should be awarded. Therefore, the issue to be addressed is how best to administer the awarding of expenses, as opposed to whether or not they should be awarded.

Part 2 of the report outlines the way forward following the consultation. It highlights the main changes made to the proposals as a result of the consultation exercise and further development of the rules and processes to be adopted by the Scottish Charity Appeals Panel.

The Scottish Executive is finalising the rules which will govern the practice and procedure of the Scottish Charity Appeals Panel and we expect these rules to be laid by the end of November.

The Scottish Executive
November 2006

Acknowledgements

1. The Scottish Executive would like to thank all those who took time to respond to the consultation on the proposals for the Scottish Charity Appeals Panel and all those who were involved in the development of the Charities and Trustee Investment (Scotland) Act 2005.

Introduction

2. The consultation paper was published on 15th December 2005 with a deadline for responses by 10 March 2006. The consultation paper set out the Scottish Executive's proposals for the Scottish Charity Appeals Panel and the rules that will govern its procedure. The Scottish Ministers must constitute an Appeals Panel under section 75 of the Act. Schedule 2 of the Act contains powers to make rules for the Panel.

3. This report consists of two main parts. The first part provides a summary and analysis of the written responses received by the Scottish Executive to the public consultation on the proposals for the Scottish Charity Appeals Panel and the rules that will govern its procedure. The second part contains an outline of the next steps and the main changes the Executive plans to make following the consultation. There is also a list of respondents whose names we have permission to publish attached at Annex A.

PART 1: SUMMARY AND ANALYSIS OF RESPONSE

4. The consultation paper outlined the main proposals for the operation of the Scottish Charity Appeals Panel and asked a number of questions on key issues. These included the timeframes set out for appeals to the Panel, whether parties should be able to insist on having an oral hearing and what evidence the Panel should be able to consider and views on the awarding of expenses.

Responses

5. Around 300 consultation papers were issued during the consultation exercise and the paper was also available on the Executive's website. 39 written responses were received, of which 33 were from organisations and 7 from individuals. A list of those who responded and gave permission for their name to be published is included at Annex A. A breakdown of the organisations by type is given in the table below.

TYPE OF ORGANISATION	NUMBER OF RESPONSES
Charities and voluntary sector bodies	15
Business/Professional bodies	3
Local Authorities	5
Other public sector bodies	5
Higher and Further education bodies	1
Schools	1
Religious bodies	3
Political parties	0
Individuals	7

6. The written responses that the Executive has been given permission to publish are available in the Scottish Executive Library and can be viewed on request by phoning the Scottish Executive Library Information Service on 0131 244 4552. They can also be viewed online at <http://www.scotland.gov.uk/Publications>.

Findings

7. Overall, there was broad support for proposals to establish a Scottish Charity Appeals Panel. Many responses welcomed an appeals system which should prove straightforward, cost-effective and transparent. There were very few comments on the role and location of the Secretariat and those that did cover the issue emphasised the need for independence from those in the Scottish Executive with policy responsibility for charity law. There were a number of requests for non-

statutory guidance on issues such as the definition of vexatious appeals and appealing the Panel's decisions to the Court of Session.

Timeframe for appeals

8. The consultation paper proposed that the Panel should be required to send an acknowledgement to the appellant within 10 days of receipt of the appeal. OSCR and the appellant would then have 28 days to submit evidence to the panel.

9. 35 responses commented on these proposals. The majority of responses considered the timeframes of the appeals process to be acceptable, especially in light of the objective of trying to keep the appeals process as swift and as simple as possible.

10. There was some concern that 28 days to submit evidence to the Panel would be a tight timeframe for both the appealing body and OSCR to respond within. There was a particular concern that where boards of trustees met infrequently, there may be occasions where it would not be possible to convene a meeting of trustees in time to respond adequately.

11. There was support for the provision allowing the Panel to adjourn a hearing if there were delays in obtaining evidence or to allow for extenuating circumstances.

12. Respondents also felt that it was appropriate that the Panel functioned within the same timeframe as appellants and that a 28 day deadline should be given for the Panel to publish its written response and decision.

13. Several respondents suggested that more leeway should be afforded to the body making the appeal in terms of timeframe set out for bodies to appeal to the Panel, and to subsequently provide written evidence. It is worth highlighting that the 28 day limit for lodging an appeal with the Panel, following OSCR's confirmation of a decision, is set out under section 76 of the Charities and Trustee Investment (Scotland) Act 2005 and cannot be altered by these rules.

Hearings

14. The consultation proposed that if an oral hearing were considered necessary by the Panel, or if one or both parties requested an oral hearing, then an oral hearing would be convened, with parties given at least 14 days notice of the date. The parties could choose to provide evidence by written submission rather than attend an oral hearing.

15. Of the 30 replies that responded to this question, nearly all respondents felt that it was important that if any party requested an oral hearing then a hearing should be convened. It was felt that this gave the appeal process credibility and transparency. One respondent suggested that the Panel should have the power to over-ride requests for an oral hearing, in order to limit expense to the charity, as an oral hearing may put a charity to unnecessary expense.

16. Where the Panel is satisfied that a private hearing is required in the interests of morality, public order, the interests of juveniles, the protection of the private lives of the parties, national security, or where in the opinion of the Panel publicity would prejudice the interests of justice, then a hearing could be convened in private. It was suggested that this be subject to a test of reasonableness as determined by the Panel.

17. However, there was agreement that even where an appeal is held in private, the Panel's decision should be made public to keep the process transparent, and, where reasonable, the rationale for the decision should also be made public.

18. There was agreement that the Panel should be able to summon witnesses to give evidence. It was also felt that the Panel should be able to prohibit the use of all types of recording device, including photography, during a hearing.

Should new evidence be considered by the Panel?

19. 33 of the 40 responses commented on whether the Panel should consider new evidence. Opinion was split on whether the Panel should be able to consider new evidence which had not been available to OSCR when making its decision. Of those that responded to this question, the majority of respondents were in favour of the Panel being able to consider new evidence with qualifications. They felt that this would allow the Panel to take informed decisions on up-to-date evidence, since the Panel's decision should be made on the most relevant information available, in the interests of good decision-making. It was also suggested that if the Panel were to consider new evidence this could reduce the number of appeals taken to the Court of Session.

20. There was a common feeling amongst those in favour of the Panel considering new evidence that if the Panel were to consider new evidence, the new evidence should first be reviewed by OSCR.

21. The remainder felt that it would be unreasonable if the Panel were able to consider information not available to OSCR and that this would, in fact, be a new decision rather than an appeal against the original

decision. The majority of these thought that new evidence should not be considered by the Panel, but that it should first be considered by OSCR.

22. The overriding feeling amongst most respondents, whether in favour or opposed to new evidence being considered by the Panel, was that once the new evidence had been considered by OSCR and if their opinion remained unchanged, the appellant should then be able to appeal against OSCR's decision.

Expenses

Should provision be made for the award of expenses?

23. The consultation paper asked whether the rules should allow the Panel to award expenses. 33 respondents answered this question. Of these nearly all felt that it was appropriate that the Panel be able to award expenses.

24. Many welcomed the award of expenses where the decision of the Panel was in the charity or appealing body's favour, in light of many charities' limited funds. However, where the charity was unsuccessful in its appeal, the award of expenses against it was not welcomed unless there had been considerable unreasonable conduct involved or unnecessary contributions to the expense of the appeal process had been made. This is in line with the consultation proposals where it is proposed that the award of expenses can only be made in very limited circumstances.

25. Concern was also expressed that the award for expenses against a charity could have serious financial repercussions. The point was made that many charities' funds are wholly tied to the detail of specific contracts or grant conditions and that they would not be permitted under such agreements to use these funds for any other purpose, such as paying appeal expenses.

26. However, in mitigation of some of these concerns, some respondents suggested that the Panel ought to ensure that an expenses award was proportionate and reasonable and took into account the charity's ability to pay, based on the restrictions placed on its funds. It was also suggested that expense awards should be based on the actual costs of the parties involved and that additional compensation claims should not be considered.

27. Respondents were concerned that where an award was made against an appellant on the basis of a vexatious appeal having been made, this could be seen to deter appellants from appealing and deprive

the appellant of the right to appeal. This concern over vexatious appeals would seem to be consistent with requests for the Executive to give more guidance on what would constitute a vexatious appeal.

28. A small minority felt that the award of expenses should not be made, considering it to offer a dubious incentive for people to make an appeal or presenting an additional risk for a charity with limited funds to pursue an appeal.

If a provision is made for the award of expenses should there be a maximum sum up to which expenses can be awarded by the Panel?

29. The consultation paper also asked whether there should be a limit on the level of expenses that could be awarded. Of the 33 parties who responded with regard to the award of expenses, there was an even split between those who favoured a maximum award, those who opposed a maximum award and those with no view.

30. Some respondents who felt that there should be a maximum limit were of the opinion that if there were not a maximum, the potential threat of a prohibitive award against a charity or other voluntary body could deter them from appealing and could be viewed as depriving the charity of their right to appeal against OSCR's regulatory decision-making process.

General Process

31. A number of responses commented on the appeals process in general.

32. Some respondents felt that if the Panel were to strike out an appeal then the rationale for its decision should be given, as should guidance on what options the appellant had with regard to pursuing their appeal further.

33. The Panel's power to exclude from any hearing, or part of it, any person (including a party or the party's representative) whose conduct has disrupted the hearing, was commented upon by several respondents. They requested that, after informing the Panel of the representatives attending the hearing, they should be made aware of the likelihood of any representative being excluded.

Part 2: Next Steps

Panel Members

34. Scottish Ministers have appointed 24 members to the Scottish Charity Appeals Panel (8 chairs and 16 members) following the Commission for Public Appointments Code of Practice. The Panel members took up their appointments on 1 October 2006. Staff have been recruited for the Panel Secretariat and they are currently developing processes to ensure the smooth running of the Panel.

Timeframe

35. We propose that the secretariat will acknowledge all appeals no later than 14 days after receipt. Although there was some concern from responses about appellants submitting written evidence to the secretariat within 28 days, it was felt this should remain. This decision has been taken to ensure that all appellant bodies are treated equally. In addition, because the appeal to the Panel will follow the body's request for an internal review by OSCR, we would expect the body to have all the necessary information prepared. Indeed, we intend that the revised rules will indicate that the body is to submit written statements and copies of all the documentation that had been provided to OSCR before OSCR reached the decision which is being appealed.

36. OSCR will be required to provide a copy of the decision against which the appeal is made no later than 42 days after the date of the SCAP secretariat's acknowledgement of an appeal. OSCR may within this deadline lodge written submissions with the Panel in response to the appeal.

37. The secretary shall give the appellant and OSCR no less than 14 days notice of a fixed date for the hearing. The notice will state the date, time and place as well as the Panel members, with information and guidance on proceedings. The date, time or place of the hearing can be altered; however, no less than 14 days notice must be given of any such change. Arrangements will not be changed after this unless they are agreed by all parties or in the case of illness or other exceptional circumstances affecting the attendance of a panel member.

38. Many respondents felt that it was appropriate for the Panel to function within a set timeframe and that a deadline for the Panel to publish its written response would be appropriate. A deadline of 21 days after the appeal has been heard will be set for the Panel to provide a written rationale for their decision to both parties. We would, however, expect that in many cases the Panel will announce its decision at the hearing.

Hearings

39. In response to the support for the proposal that either party should be able to request an oral hearing, the rules shall be revised so that all hearings will be oral unless both parties indicate they do not require a hearing. In these situations the Panel will then decide whether to proceed with an oral hearing.

40. If a party, or the Panel, believes that evidence to be heard is of a sensitive or confidential nature, then they will be able to request that the relevant part of the hearing be conducted in private. If the Panel considers this to be reasonable, it will meet in closed session.

41. The rules will allow the Panel to adjourn the hearing until a later date and also allow the Panel to request further information. Although they will not provide the Panel with the power to insist that certain witnesses appear we would expect that the parties would wish to work with the Panel where possible.

42. The right to prohibit photography will be extended to cover all forms of recording equipment.

Decisions

43. Panel decisions will always be made public and listed on the SCAP website, as well as in the SCAP register of appeals. A report on each decision will also normally be made available, except where sensitive information is concerned. If a report is not published in full, an explanation will be given on the website as to why. Following representations made in the consultation responses, a time limit for the Panel to make the decision will be included in the rules.

44. In the case of the Panel making a decision without a hearing, we propose that the Panel will set a date by which it must receive all supporting documentation and OSCR's response to the appeal. The Panel may then determine the appeal at any time after this deadline.

Evidence the Panel can Hear

45. Following further consideration, we have come to the view that the rules should not cover the introduction of new evidence, which was not available to OSCR at the time it made the decision which the Panel are reviewing. We do not think it appropriate to stipulate what the Panel should consider, beyond that which is already set out in section 71 of the Charities and Trustee Investment (Scotland) Act 2005. It will be for the Panel to decide whether evidence presented before it is new and how it should proceed. If new evidence comes to light during the appeal it could

be that the Panel would use section 76(5)(c) of the Act to remit the decision back to OSCR so that they may reconsider their decision in light of the new evidence. Alternatively, such “new evidence” may be viewed as not substantive enough to warrant a reconsideration of the decision by OSCR. Ultimately, it should be for the Panel to decide how it proposes to treat the introduction of new evidence on a case by case basis.

Award of Expenses

46. The rules will enable the Panel to award expenses. Following further consideration of the arguments for and against setting a maximum limit for expenses, we have decided not to include a limit in the rules – with no precedent and the potential variety in the appeals that the Panel will consider, it is very hard to determine what a suitable limit would be. However, we expect that the awarding of expenses will be the exception, not the rule.

General Process

47. Each party shall be required to submit evidence to the Panel prior to a hearing and will be given the opportunity to view the opposing party’s documentation, as all papers shall be sent out to both parties by the Panel secretariat.

48. Prior to a hearing each party will be required to inform the Panel Secretariat whether they will be attending, or represented at the hearing.

49. A number of consultation responses raised the issue of the Panel striking out appeals. The Charities and Trustee Investment (Scotland) Act 2005 (section 71) sets out the decisions that may be appealed to the Panel. Appeals against these decisions are the only ones that the Panel can consider. If the Panel receives an appeal against a decision outside its remit it would need to inform the appellant that it could not consider the appeal.

50. Where a Panel considers that an appeal before it is vexatious and without merit then it may decide to confirm OSCR’s decision and consider whether an order for expenses should be made against the appeal in terms of the Rules. We expect this will help deter a vexatious appeal. In addition, a body can appeal a decision to the Panel only once.

51. The Panel shall provide a statement of case to the Court of Session for any case which is appealed to the Court, in order that the events that have led to the case being further appealed be made clear. This statement of case shall be based upon the written decision provided to each party post-hearing.

Next steps

52. The draft SCAP rules are now being revised and finalised in the light of the responses received to this consultation exercise and further consideration by the Executive on the operation of the Panel. The consultation paper explained that the proposed rules issued for consultation had been drafted in some detail and it was possible that in considering the responses to the consultation, and while establishing the Panel that the Executive would decide to simplify and slim down the rules. Following careful consideration we have decided to simplify the rules so that they are as user friendly as possible. They will however still cover all the areas the consultation covered, such as setting out a timescale, indicating who may attend a hearing, the awarding of expenses and the publication of decisions.

List of Respondents

An alphabetical list of those who responded to the consultation and gave permission for their names to be published.

Aberdeen City Council
Bircham Dyson Bell
Brethren
Campbell, Gregor
Capability Scotland
Church of Scotland (Solicitor of)
Citizen Advice Scotland
Coghill, Andrew W F
Cowan, Ian J
Forget Me Not Club
Edinburgh Academy, The
Environmental Campaigns
Falkirk Council
Fleetwood, J
Glasgow City Council
Hospital Broadcasting Association
Institute of Fundraising Scotland
Keatinge, Alastair
Motherwell Guild of Help
Office of the Scottish Charity Regulator (OSCR)
Orkney Islands Council
Play Scotland
Reach
Reid Kerr College
Royal National Lifeboat Institution
Royal College of Physicians of Edinburgh
Royal Environmental Health Institute of Scotland, The
Royal Society for Protection of Birds Scotland (RSPB)
Scottish Association for Mental Health (SAMH)
Scottish Charity Finance Director's Group (SCFDG)
Scottish Council for Volunteer Organisations (SCVO)
Scottish Council of Jewish Communities
Scottish Rights of Way and Access Society (SRWAS)
Scottish Sports Association
Scottish Women's Aid
Sense Scotland
Sick Kids Friends Foundations
West Lothian Council
Windsor, Paul Graham

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