

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

**CONSULTATION ON OPTIONS FOR  
FUTURE CHARITY APPEALS ROUTE IN  
SCOTLAND**



**The Scottish  
Government**  
Riaghaltas na h-Alba

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# Scottish Government Consultation on Options for Future Charity Appeals Route in Scotland

## Introduction

1. The Charities and Trustee Investment (Scotland) Act 2005 was passed by the Scottish Parliament on 9 June 2005 and received Royal Assent on 14 July 2005. The Act introduced new arrangements for the regulation of charities in Scotland and established the Office of the Scottish Charity Regulator (OSCR) as the new independent regulator. The legislation provided for the establishment of an independent appeals panel as an important counterbalance to OSCR within the overall regulatory regime. Charities could appeal certain decisions made by OSCR, which the Panel would consider.

2. The Scottish Charity Appeals Panel (SCAP) was set up on 1 October 2006 as a new executive Non-Departmental Public Body (NDPB). SCAP replaced the previous appeals route of applying to the Court of Session, providing a simpler, quicker and more cost effective means than litigation for charities, and those involved in their management, to appeal decisions affecting them. The Scottish Charity Appeals Panel Rules, which set out the procedure for hearing appeals, came into force on 31 December 2006.

3. It was initially envisaged that SCAP would receive between 50-100 appeals per year. However, in 3 years of operation, SCAP has only received 1 appeal with 1 further appeal pending. As a result, on 6 November 2008, the Scottish Government **announced its intention** to abolish SCAP and consult on where its functions would best sit. This consultation seeks those views from the charity sector and other interested parties. Whilst there is no longer a need for a stand-alone charity appeals body, the Scottish Government is committed to maintaining an appeals route for charities unhappy with a decision of the Office of the Scottish Charity Regulator (OSCR). However, the decision to abolish SCAP as a stand-alone body has been taken, and is not, therefore, the subject of this consultation.

4. This consultation is your opportunity to have your say about the location of the new appeals route before any decision is taken by the Government. Although the consultation focuses on the location of the new appeals route, we would also welcome any comments that you may have on the functions or operation of the new appeals route.

5. You are invited to respond before the closing date of 5 April 2010 in writing to:

Charity Consultations  
Charity Law Team  
Scottish Government  
Area 2W, St Andrews House  
Edinburgh EH1 3DG  
Email: CharityAct@scotland.gsi.gov.uk

## **Handling your response**

6. We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the Respondent Information Form (page 15), which is enclosed with this consultation paper, as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and treat it accordingly.

7. All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would, therefore, have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

## **Next steps in the process**

8. Where respondents have given permission for their response to be made public (see the attached Respondent Information Form – page 15), these will be made available to the public in the Scottish Government Library and on the Scottish Government web pages by the end of 4 May 2010. We will check all responses where agreement to publish has been given for any potentially defamatory material before logging them in the library or placing them on the website. You can make arrangements to view responses by contacting the SG Library on 0131 244 4556. Responses can be copied and sent to you, but a charge may be made for this service.

## **What happens next?**

9. Following the closing date, all responses will be analysed and considered along with any other available evidence to help us reach a decision on how to move forward.

## **Comments and complaints**

10. If you have any comments about how this consultation exercise has been conducted, please send them to the address above.

## **THE SCOTTISH GOVERNMENT CONSULTATION PROCESS**

11. Consultation is an essential and important aspect of Scottish Government working methods. Given the wide-ranging areas of work of the Scottish Government, there are many varied types of consultation. However, in general, Scottish Government consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

12. The Scottish Government encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors, and no two exercises are likely to be the same.

13. Typically Scottish Government consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Government web site enabling a wider audience to access the paper and submit their responses (<http://www.scotland.gov.uk/consultations>). Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. Copies of all the written responses received to a consultation exercise (where the individual or organisation has given us permission to publish their response) are placed in the Scottish Government Library at Saughton House, Edinburgh (K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD, telephone 0131 244 4556).

14. The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review;
- inform the development of a particular policy;
- help decisions to be made between alternative policy proposals; and/or
- be used to finalise legislation before it is implemented.

15. Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

16. While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

17. All Scottish Government consultation papers and related publications (eg analysis of response reports) can be accessed at: **Scottish Government consultations** (<http://www.scotland.gov.uk/consultations>).

18. The Scottish Government now has an email alert system for consultations (SEconsult at <http://www.scotland.gov.uk/Consultations/seConsult>). This system allows stakeholder individuals and organisations to register and receive a weekly e-mail containing details of all new SG consultations (including web links). SEconsult complements, but in no way replaces, SG distribution lists, and is designed to allow stakeholders to keep up to date with all SG consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

19. This consultation, and all other Scottish Government consultation exercises, can be viewed online at <http://www.scotland.gov.uk/consultations>.

## Background

20. SCAP was established was established by section 75 and schedule 2 of the Charities & Trustee Investment (Scotland) Act 2005 (the 2005 Act) to consider appeals against certain decisions made by OSCR under the 2005 Act. Section 71 of the 2005 Act sets out the decisions which can be appealed to SCAP, while section 76 sets out the options which are available to SCAP when considering an appeal. SCAP was established as an NDPB in October 2006.

21. In October 2006 Scottish Ministers appointed 24 panel members, 8 of whom were appointed to act as Chairs of panels. Panel members are remunerated for day's service, while staff within the Scottish Government Legal System Division provide secretariat support, as and when required.

22. The detailed procedures which set out the rules for appealing and the operation of the panel, the hearing and decision, are contained in Scottish Statutory Instrument 2006, No 571, the Scottish Charity Appeals Panel Rules 2006, which came into force on 31 December 2006

23. In the 3 years since its creation, OSCR has issued 421 decisions (other than those connected to establishing an accurate Scottish Charity Register) that could be reviewed under Section 74 of the Charities and Trustee Investment (Scotland) Act 2005. Of these, 29 have been subject to an internal review by OSCR. Following internal review, 16 of these were confirmed which then allowed them to be appealed to SCAP. To date, 2 appeals have been lodged with SCAP; one of which has been heard, with the other one pending.

24. When creating and establishing SCAP, it was difficult to accurately predict the number of appeals which would be made by charities under an entirely new legislative framework for charities. Initial estimates were that between 50-100 appeals would be heard each year. Based on the number of appeals to date, the number of decisions made by OSCR, and the potential number of decisions made by OSCR in the Rolling Review process, we now estimate a maximum figure of approximately 40 potential appeals per year is possible. This relatively small number of appeals does not justify maintaining a stand alone appeals route.

25. Although the Scottish Government announced, in November 2008, its intention to abolish SCAP, the process involved in making the changes is one which will take some time to implement. This is because SCAP is established by an Act of the Scottish Parliament, and can only be abolished by another Act. The Public Service Reform Bill (PSR Bill), which was introduced to Parliament on 28 May 2009, will provide the power to make the necessary changes. Further information on the PSR Bill can be found on the Scottish Parliament website at <http://www.scottish.parliament.uk/s3/bills/26-PubSerRef/index.htm>. Because the PSR Bill needs to complete the parliamentary process before the power could be used, we do not expect to be in a position to implement any changes until at least late 2010.

26. The announcement by Scottish Government of its intention to abolition SCAP also made clear that an appeals route will remain for those charities wishing to

appeal certain decisions made by OSCR under the 2005 Act. Furthermore the Government has made clear its intention that SCAP will remain until such time as a suitable replacement is established.

## **Charity Appeals Routes in other jurisdictions in the United Kingdom**

### England & Wales

27. The Charities Act 2006 establishes a body known as the Charity Tribunal (the Tribunal), to:

- hear appeals against decisions made by the Charity Commission for England and Wales (the Commission);
- hear applications for review of decisions of the Charity Commission; and
- consider references from the Attorney General or the Charity Commission on points of law.

The Tribunal is part of the Tribunal Service, an executive agency of the Ministry of Justice, responsible for 25 different tribunals.

28. The Charity Tribunal consists of a President, 5 legal members and 7 ordinary members, with the back panel consisting of one, two or three members.

29. The charity appeals route in England & Wales has changed slightly in 2009 as a result of the establishment of the First-tier Tribunal, a new generic tribunal established by the UK Parliament under the Tribunals, Courts and Enforcement Act 2007. The First-tier Tribunal's main function is to hear appeals against certain decisions of the Government, including those in relation to charities.

30. The Upper Tribunal has been created to deal with appeals from, and enforcement of, decisions of the First-tier Tribunal.

31. The First-tier Tribunal (Charity) only has jurisdiction in respect of certain decisions, made by the Charity Commission after 18 March 2008, to be appealed. Further information on these changes to the appeals process can be found at:

<http://www.charity-commission.gov.uk/tcc/reviewproc.asp> or  
<http://www.charity.tribunals.gov.uk/#>

### Northern Ireland

32. The Charities Act (Northern Ireland) 2008 contains provision (similar to charity legislation in England & Wales) for the establishment of a Charity Tribunal for Northern Ireland (the NI Tribunal). The NI Tribunal will have jurisdiction to –

- hear appeals against decisions made by the Charity Commission for Northern Ireland (the NI Commission);
- determine applications for review of certain decisions (reviewable matters) made by the NI Commission; and
- consider references made to it by the Commission or the Attorney General.

33. There will also be a further right of appeal to the Court against a decision made by the Tribunal. Commencement of the legislative provisions relating to the NI Tribunal is scheduled for autumn of this year and it is expected that the NI Tribunal will be operational by spring 2010.

### **Options for Future Charity Appeals Route in Scotland**

34. SCAP was established to provide a simple and cheap way for charities and those involved in their management to appeal certain decisions made by OSCR. Prior to the establishment of SCAP, under the Charities and Trustee Investment (Scotland) Act 2005, decisions relating to the supervision of charities under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 could be appealed to the Court of Session. This was time consuming and expensive for charities, many of who did not have the funds to appeal. Appeals in relation to the granting of charitable status were made to Her Majesty's Revenue and Customs (Inland Revenue) Commissioners.

35. The number of appeals received by SCAP has been far fewer than anticipated and, in response to this, on 6 November 2008, the Scottish Government **announced its intention** to abolish SCAP whilst remaining committed to maintaining an appeals route for charities unhappy with a decision of the Office of the Scottish Charity Regulator (OSCR). The low number of appeals received to date means that a stand alone charity appeals body is no longer justified, particularly in light of current pressures on public spending.

36. The Scottish Government has developed options which it considers may be appropriate routes for charity appeals in Scotland, following the abolition of SCAP, and we would welcome your views on those options, discussed below.

#### **Option 1: Replace with appeal to Court Of Session**

37. The advantages of this option would include the continued independence of the appeals route from Ministers and OSCR. While the cost of appealing through this route would undoubtedly be higher than currently, the low number of appeals suggests that cost is not a consideration for charities when deciding whether to appeal a decision by the Regulator. Charities who are currently unhappy with a decision made by SCAP have the option of appealing that decision to the Court of Session. Therefore most significant decisions are likely to end up here. It is worth noting that the option to replace SCAP with an appeal to the Court of Session would merely be a return to the appeals route open to charities prior to the establishment of SCAP.

**Question 1: Do you agree with the approach to replace SCAP with the route of appeal to the Court of Session?**

## **Option 2: Replace with appeal to Sheriff Court**

38. The advantages of this approach mirror some of those for option 1, above. In addition, the costs of an appeal to the Sheriff Court would be lower than the costs for an appeal to the Court of Session. However, it is worth pointing out that the Scottish Government is currently considering proposals made by Lord Gill in his report of the **Scottish Civil Courts Review**, published on 30 September 2009, to reform the structure of Sheriff Courts in Scotland. These proposals include; introducing a new judicial office-holder within the sheriff court (the District Judge) who would deal with certain cases currently dealt with by sheriffs, and the introduction of “specialised” sheriffs with expertise in particular areas. This option could mean further changes to the charity appeals route, in determining where it would sit in any new structure.

39. A possible disadvantage would be the loss of a specialist jurisdiction with a particular knowledge of charity law issues, although this could perhaps be mitigated by developing a degree of specialism in this subject amongst a certain number of sheriffs.

**Question 2: Do you agree with the approach to replace SCAP with the route of appeal to the Sheriff Court?**

## **Option 3: Replace with separate structure within OSCR**

40. This would mirror some of the advantages of a general tribunal body and could be accommodated as a new and distinct role for the OSCR Board. The Board members are non-executive directors, and are not involved in decision making, therefore their role could be expanded to cover decisions on appeals. However, the most significant drawback would be the lack of independence from the body against which an appeal was being made.

**Question 3: Do you agree with the approach to replace SCAP with an appeals structure within OSCR?**

## **Option 4: Merge with another tribunal body**

41. This option would have the advantage of maintaining an appeals route without recourse to the courts, which may be more cost-effective and quicker for appellants and the regulator. In addition, independence from both Ministers and OSCR would also be maintained. Potential difficulties might include the lack of expertise among tribunal members, who would not necessarily be specialists in charity law. This lack of expertise could be addressed by having a pool of charity law specialists who could be called upon to sit as panel members on existing tribunals, as and when required.

42. There are a number of existing tribunals in Scotland, the largest of which are: Children’s Hearings, the Lands Tribunal for Scotland and the Mental Health Tribunal for Scotland. However, there is currently no tribunal body in Scotland which carries out a directly comparable function. As well as amending the Charities & Trustee

Investment (Scotland) Act 2005, this option could involve amending legislation covering the other tribunal body involved.

**Question 4: Do you agree with the option to merge SCAP with another tribunal body?**

**Option 5: Consider as part of the ongoing tribunals review**

43. The Scottish Government is currently considering possible changes to tribunals in Scotland. In September 2008 the Administrative Justice Steering Group, chaired by Lord Philip, published a report on tribunals, *Options for the Future Administration and Supervision of Tribunals in Scotland*. It found the current arrangements were unsatisfactory, and set out five options for the future. We have said that we will examine in depth two of those options:

- establishing a Scottish Tribunals Service to support all devolved tribunals; and
- establishing a Scottish Tribunals Service to support both devolved tribunals and GB-wide tribunals operating in Scotland.

44. We are currently gathering information and discussing the issues with those involved with tribunals. We are also looking at ways to improve the operation of tribunals before the possible creation of such a Service. We want to improve access to justice, and ensure there is a consistent standard of service across the tribunal system. Areas we are exploring include IT systems, accommodation, hearing venues and administrative support. We are also looking at the tribunal appointment processes and training of tribunal members.

45. In June 2009 the second report of the *Administrative Justice Steering Group* was published, which recommended that Scottish Ministers consider the establishment of a Scottish Tribunal Service to support all administrative justice tribunals operating in Scotland. We plan to be able to consult publically on the way forward for tribunals in Scotland by the summer of 2010.

46. As with option 4, this option would have the potential advantage of maintaining an appeals route without recourse to the courts, which may be more cost-effective and quicker for appellants and the regulator. In addition, independence from both Ministers and OSCR would also be maintained. Potential difficulties might include the lack of expertise among tribunal members, who would not necessarily be specialists in charity law.

47. This option will not be available immediately and it may be that if this is the preferred option, the Scottish Government would have to look at an alternative option for the charity appeals route in the short term. If this is your preferred option we would appreciate if you could state which alternative option you would like to see taken forward in the short term.

**Question 5: Do you think SCAP should be considered as part of the review of tribunals in Scotland?**

**Question 6: If your preferred option is option 5, which alternative option do you think should be considered in the short term?**

**Consultation on Option for Future Charity Appeals Route in Scotland:  
Summary of Questions asked in Consultation Paper**

**Question 1**

**Do you agree with the approach to replace SCAP with the route of appeal to the Court of Session?**

**Question 2**

**Do you agree with the approach to replace SCAP with the route of appeal to the Sheriff Court?**

**Question 3**

**Do you agree with the approach to replace SCAP with an appeals structure within OSCR?**

**Question 4**

**Do you agree with the option to merge SCAP with another tribunal body?  
If yes, which body should it be merged with?**

**Question 5**

**Do you think SCAP should be considered as part of the review of tribunals in Scotland?**

**Question 6**

**If your preferred option is option 5, which alternative option do you think should be considered in the short term?**

**The Scottish Government would further welcome your views on the following:**

**What, in your view, are the key features of a new charity appeals route?**

**Are there any other options which you would like to be considered at this time?**

**Are there any other issues regarding the functions or operation of the new appeals route which you wish to raise at this time?**





# RESPONDENT INFORMATION FORM

Please Note That This Form **Must** Be Returned With Your Response To Ensure That We Handle Your Response Appropriately

## 1. Name/Organisation

Organisation Name

Title Mr  Ms  Mrs  Miss  Dr  Please tick as appropriate

Surname

Forename

## 2. Postal Address

  
  

Postcode	Phone	Email
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## 3. Permissions

I am responding as...

**Individual** / **Group/Organisation**   
 Please tick as appropriate

**(a)** Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate  Yes  No

**(b)** Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick **ONE** of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

**(c)** The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate  Yes  No

**(d)** We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate  Yes