

By online form: <https://consult.gov.scot/third-sector/review-of-charity-regulation/>

22 July 2024

Dear Sir / Madam,

### **Scottish Government: Review of charity regulation**

The Chartered Governance Institute UK & Ireland (CGIUKI) is the professional body for governance and the qualifying and membership body for governance professionals across all sectors. Its purpose under Royal Charter is to lead effective governance and efficient administration of commerce, industry, and public affairs working with regulators and policymakers to champion high standards of governance and providing qualifications, training, and guidance. As a lifelong learning partner, the Institute helps governance professionals achieve their professional goals, providing recognition, community, and the voice of its membership.

One of nine divisions of the global Chartered Governance Institute, which was established 130 years ago, The Chartered Governance Institute UK & Ireland represents members working and studying in the UK and Ireland and many other countries and regions including the Caribbean, parts of Africa and the Middle East.

As the professional body that qualifies Chartered Secretaries and Chartered Governance Professionals, our members have a uniquely privileged role in organisations' governance arrangements. They are therefore well placed to understand the issues raised by this consultation document. In preparing our response we have consulted, amongst others, with our members. However, the views expressed in this response are not necessarily those of any individual members, nor of the charities they represent.

Our views on the questions asked in your consultation paper are set out below.

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## **Purpose for a review**

### **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.**

CGIUKI welcomes the Scottish government's commitment to a wider review of charity regulation following the passing of the 2023 Charities Regulation and Administration (Scotland) Act. This Act was a welcome move towards improving accountability and transparency in the sector. Its key focus is introducing changes to the role of the regulator, OSCR, which have received widespread support. However, these changes to the regulators' powers do not necessarily address the more widespread issues facing charities this decade.

The 2005 Charities and Trustee Investment (Scotland) Act was introduced almost two decades ago, and there has been significant change within the sector since. Indeed, even since the much more recent consultation on charity law in 2019, the operating environment for charities has undergone drastic change. Legislation needs to keep pace with these developments to support charities in undertaking their work. This is also an opportunity for the Scottish government to take a proactive approach to emerging issues including the challenges of technology and climate change, and safeguard the sector for the years to come.

Crucially, a review of charity regulation needs to consider the whole range of regulatory requirements and duties by which charities are bound – and not only those of the 2005 Act. This will allow a more holistic approach, improving accountability and reducing unnecessary regulatory overlaps which can represent a burden for some. In particular, a review needs to consider carefully the impact and proportionality of regulation on smaller charities, which make up the majority of the Scottish charity sector.

To ensure the most effective outcomes for the sector, any review should be independent. This is highlighted in the Social Justice and Social Security Committee's report on the Charities (Regulation and Administration) (Scotland) then-Bill. The government must commit to resourcing this review appropriately, and to include significant engagement with charities across Scotland during the review process. CGIUKI encourages the government to proceed with this in an efficient and timely manner. Meaningful reforms are likely only to materialise some years after the initial review – and the sooner, the better. There was already significant support across the sector for a wider review of charity regulation following the consultation on the 2023 Act, which took place in 2019.



- 3. If a review of charity regulation is undertaken, which one of the following should be the purpose of the review (choose one):**
- a. To assess the effectiveness of current charity regulation in meeting the future needs of the sector**
  - b. 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**
  - c. Don't know**
  - d. Other – please specify**

Both 'A' and 'B'. The key purpose and main priority should be 'A', which is likely to contain, as a part of it, an assessment of 'B'. Several areas of 'B', particularly relating to OSCR as regulator, were already addressed through the 2019 consultation, and the subsequent 2023 Act which arose out of that consultation. There is, however, significantly more that could be done, as was reflected in the sector's response to the 2019 consultation. As mentioned in our response to question 1, the charity sector has seen a significant amount of change since the 2005 Act came into force. Charity regulation which meets the future needs of the sector would and should address issues including trusteeship, social enterprises, technology, reporting and accounting. It should be mindful not to increase the overall burden of regulation on charities, and to ensure that requirements are proportionate to charities' size and income.

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

Yes. As the professional and qualifying body for governance professionals and chartered company secretaries across all sectors, CGIUKI is able to consult with our members and respond to reviews and consultations on an ongoing basis.

#### **Parameters for a review**

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

There are several topics which a review should cover, which will require prioritisation. Overall, the sector would benefit from greater harmonisation and streamlining of regulatory requirements. CGIUKI would welcome the inclusion of the following topics in particular:

- Trustee recruitment, remuneration and diversity. Many charities struggle to recruit trustees with the necessary skills, experience and knowledge. Trustee diversity is particularly important, and many charities are looking to appoint board members who have lived experience of the issues that the charity exists to address. Under specific conditions and with the appropriate guardrails, remunerating trustees can be an effective means (one of many) to open up charity boards to



more diverse trustees. The charity sector in Scotland needs more support – and more flexibility – to recruit from a wider pool of talented potential trustees.

- Consolidation of the Scottish charity accounting regulations. Several amendment regulations have been issued in relation to the Scottish charity accounting regulations, since the 2006 Charities Accounts (Scotland) Regulations. It would be beneficial to issue consolidated regulations, which would be significantly clearer for charities and their advisers.
- Winding up and dissolving charities. Current provisions around the winding up and dissolution of charities can lead to unnecessary resource burdens and legal costs – for example, with charities maintaining a ‘shell’ structure to retain access to legacies when merging. This process could be improved and more clarity provided.
- Simplification of regulation for cross-border charities. Charities which have their headquarters elsewhere in the UK, but which have operations in Scotland, are required to register with OSCR. A greater degree of harmonisation between OSCR requirements and the requirements of the other UK charity regulators (England & Wales, and Northern Ireland), would reduce the regulatory burden for these charities.
- Disqualification of trustees. Legislative changes could be introduced to ensure that those disqualified in Northern Ireland and England & Wales are not able to hold a trusteeship in Scotland. This would support accountability and transparency in the Scottish charity sector, and reduce the ability of ‘bad actors’ to take advantage.

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

A review does not need to cover topics which relate to OSCR and which were already consulted on in 2019. This consultation led to positive outcomes relating specifically to the regulator, as introduced in the 2023 Act. The sector – and the regulator – now needs time to communicate, understand, implement and embed these changes (many of which are yet to come into force). As such, a wider review does not need to include these issues again. In particular, CGIUKI welcomes changes in the Act around the publication of charity annual reports and accounts, as well as a record of charity mergers. In due course, a review of their effectiveness would be welcome, but that time has not yet come. For their effectiveness to be felt, it is important for OSCR to communicate these changes clearly across the sector, and for these communications to reach as large a number – and as wide a range – of charities as possible.

## **7. In past consultations, some people have suggested aspects of charity regulation they think should be reviewed. These are listed below.**

- a. Charitable purposes: Should this aspect of charity regulation be reviewed? *Yes / No / Don't know***

No. The existing 16 charitable purposes set out under the 2005 Act are sufficient, and other areas for review are more pressing.



**b. Public benefit: Should this aspect of charity regulation be reviewed? Yes / No / Don't know**

Don't know. Public benefit (provision 8 of the 2005 Act) is a widespread and long-standing concept. Any review or update to public benefit in Scotland has the potential to complicate the role of charities which operate both in Scotland and other areas of the UK or abroad. The two-fold 'charity test', comprised of charitable purposes and public benefit, is explained in a relatively straightforward manner in the relevant OSCR guidance. However, with the growth of social enterprises in Scotland, there is perhaps a need to reassess and flex the 'charity test', and public benefit within it. It is possible that a new regulatory framework is needed for social enterprises.

**c. Charity trustee duties: Should this aspect of charity regulation be reviewed? Yes / No / Don't know**

Don't know. Charity trustee duties are clearly set out under section 66 of the 2005 Act, although this section also deals with both breaches of duties, and conflicts of interest. For increased clarity, perhaps it would be more straightforward to deal with conflicts of interest separately. In addition, more can be done by OSCR to communicate duties to existing trustees, to ensure that they understand and fulfil these duties. OSCR could achieve this through both traditional means such as the provision of more in-depth guidance, and through a wider variety of channels, including webinars, social media and emails.

**8. Is there anything else you think should be included in a review of charity regulation? Please explain what and why.**

Please see our response under question number 5.

**Technical areas**

**9. There are three technical topics that have been identified to form part of a 'technical workstream', separate from any wider review of charity regulation.**

**a. Reorganisation of statutory and Royal Charter charities. Should this technical topic be reviewed? Yes / No / Don't know**

Yes – although this is not a priority matter. The reorganisation of statutory and Royal Charter charities was raised in the 2019 consultation, and from the responses submitted, it appears that feedback was largely in favour of changes. Any reorganisation must retain and respect the connections that these charities benefit from with the Scottish Parliament or Privy Council, and must not undermine existing legislative frameworks or processes. Legislation must make clear to what extent the approval of reorganisation schemes falls under the purview of the OSCR. This clarity will support charities through what is often a complex, time-consuming and costly legal process. The supplemental Charter procedure



for Royal Charter bodies to amend their governing documents could be changed to include a default amendment power, exercisable with Privy Council consent. The Charities Act 2022, in force in England and Wales, has introduced changes which may be worth consideration on this issue.

**b. Incorporation to a Scottish Charitable Incorporated Organisation. Should this technical topic be reviewed? *Yes / No / Don't know***

Yes. At the completion of the 2019 consultation on Scottish charity law, there was a pledge made to address outstanding issues with the Scottish Charitable Incorporated Organisations Regulations 2011. Amendments to this regulation are needed to preserve public trust in the SCIO model and to assist smaller, unincorporated organisations to convert to SCIOs and benefit from the increased protections it provides. The processes both of applying for SCIO status, as well as dissolving an SCIO, should be streamlined. This does not rest solely with OSCR as regulator, as many charities have difficulty in transferring their assets from the old charity entity to the new SCIO. An update to the available guidance would help trustees better to understand both the benefits of SCIO status (high levels of protection against liability), and the types of costs incurred in achieving that status.

**c. Audit income thresholds. Should this technical topic be reviewed? *Yes / No / Don't know***

Yes. Audit income thresholds should be treated as a matter of priority. With the updated Charities SORP due out across the UK later in 2024, there has been significant debate over audit income thresholds and, more generally, the tiering system for charity accounts. The Scottish government should work closely with the SORP-making body in assessing and potentially revising the existing audit income thresholds. The current audit threshold of £500,000 has remained the same since the 2006 Charities Accounts (Scotland) Regulations. In England and Wales, it was raised in 2015 to £1,000,000 – although this is not necessarily the correct threshold for the sector in Scotland.

As this consultation document states, raising the threshold is not the only available answer to addressing the shortfall of auditors available to charities who have an income above the £500,000 audit threshold. The Scottish government could also consider other options to increase the availability of audit services to charities at an accessible price point. This may include hosting a centralised list of charity audit providers for charities to draw upon when finding and selecting an audit (the Department for Education, until recently, hosted a similar list of providers of external reviews of governance or board evaluations, for educational bodies seeking these services). Another option is a market study into the availability, choice and cost of charity audit providers (the Financial Reporting Council is currently undertaking such a market study into the availability of assurance on sustainability reporting for the corporate sector). A more significant change would be exempting much smaller charities (say, with an income of under £25,000) from having their accounts independently examined (externally scrutinised), as is the case in England and Wales. This would likely free up resources amongst providers of external scrutiny and audit, as well as reduce costs for the smallest charities.



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

We have no further comments.

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If you would like to discuss any of the above comments in further detail, please do feel free to contact me.

Yours faithfully,

**Emily Ford**

Policy Adviser

The Chartered Governance Institute UK & Ireland  
eford@cgi.org.uk

