withersworldwide

Charities review of the year

2023

Thank you for attending the Withers' charities and philanthropy team review of the year 2023. We have set out below some of the key matters covered in the review – for further information, please refer to the event recording and the presentation slides.

What was covered

- Review of key events for charities in 2022 and looking forward to 2023: Chris Priestley
- Implementation of the Charities Act 2022: Philip Reed
- Retained EU Law (Revocation and Reform) Bill: Alison Paines

Charities review of the year 2023

Employment law

- **Employment status** – continued developments in case law regarding employment status (whether someone is a 'worker', an 'employee' or neither/ self-employed will affect whether and to what extent they qualify for statutory protections (including national minimum wage, holiday pay, unfair dismissal etc).
  - Court of Appeal case *Nursing and Midwifery Council v Somerville* [2022] EWCA Civ 229 (25 February 2022) found that an obligation to accept and perform some minimum level of work (and, on the part of the putative employer, to offer and pay for some work) is not a prerequisite for finding that someone is a worker for Working Time Regulation / holiday pay purposes.
  - The Government has stated that it will not be implementing any legislative changes around employment status, but would publish new non-statutory guidance designed to improve clarity.

- **Off-payroll working** – for charities who use contractors, the Truss/Kwarteng administration announced the repeal of the 'off payroll working rules', briefly leading employers to think that the rules governing tax treatment of the provision of a worker's services through an intermediary or 'personal service' company might be repealed from April 2023. However, on 17 October 2022 Jeremy Hunt announced the off-payroll working rules would not be repealed – so the position remains as it was.

- ***Harpur Trust v Brazel*** – this case addressed the complexity that is created by the annual leave entitlement under the Working Time Regulations 1998 being expressed in weeks, rather than days, which can then make it difficult to calculate proper holiday for workers who work a different number of days or hours each week (particularly term-time workers and other people who have gaps between periods of work).
  - Previous Government guidance, which has now been withdrawn, suggested that a flat percentage of 12.07% could be applied (12.07% being the percentage of the year represented by the 5.6 weeks' paid holiday each worker is entitled to).
  - However, in the *Harpur Trust v Brazel* [2022] UKSC 21 case the Supreme Court ruled that percentage approach is not guaranteed to comply (because it treats holiday as accruing according to work done, rather than the period the worker is under contract). Employers with workers in this category should audit them carefully and calculate their leave on an ongoing basis.

- **Employment law developments in the pipeline**:
  - Widely reported proposed changes to rules around industrial action, in particular to provide a minimum level of service in some key sectors.
  - No sign of the long-awaited Employment Bill, but instead a raft of private members bills have been brought forward to introduce some of its key protections, including leave for neonatal care, extending redundancy protection in respect of pregnancy & maternity discrimination, a week's leave for unpaid carers, and flexible working to become a 'day one' right.

Real estate

- Post-pandemic trends towards flexible working continue to impact the real estate space, with an increase in the demand for flexibility in the workplace requiring employers to think carefully about office design and use of space.

- Some organisations may still be looking to downsize which could result in improved flexibility in leasing office space.

- There are mixed reports on whether demand for London office space is decreasing; however, data suggests that there is still an increase in flexible working patterns – with a typical 'in-office' working week now running Tuesday – Thursday.

Charities review of the year 2023

Data protection and privacy

- The Online Safety Bill currently going through Parliament introduces new rules (including a duty of care to tackle illegal content) for organisations that host user-generated content.
  - The Bill has broad application to any entities (incorporated or unincorporated) that host user generated content – so for example any charity that has a website/platform which offers a facility for users to interact with it or on a 'user to user' basis (e.g. posting comments, suggestions or private communications) will potentially be subject to the rules. It would also apply to both open (i.e. available to everyone) and closed social media groups.
  - Those caught by the Bill's provisions will be subject to a duty of care to take reasonable steps to tackle relevant illegal content and in particular to protect children.
- In relation to data protection, progress with the Data Protection and Digital Reform Bill has stalled. One interesting feature in the Bill is the proposal to allow charities to benefit from the soft-opt in (and not have to rely on consent) when marketing by email.
- In other developments, the ICO has published new guidance to assist businesses and organisations with conducting their direct marketing activities lawfully: https://ico.org.uk/for-organisations/direct-marketing-guidance-and-resources/direct-marketing-guidance/

Legacies

- Legacy income was forecast to reach a record value of £4 billion by the end of 2022 (a 14% increase compared with 2021). The predictions for this year are that legacy income will remain static, which will continue throughout 2024.
- One issue that charities face is the erosion of 'real value' of legacies due to current high inflation.
- Despite the collapse of the FTX crypto exchange, there seems to be an increase in potential for charities to be beneficiaries of crypto asset legacies, which comes with its own risks, rewards and complications that charity trustees should be alive to.

Elections and campaigning

- A General Election is on the horizon (it must take place by January 2025 at the latest) and charities therefore need to be aware of the rules of campaigning, particularly during an election period.
- The Elections Act 2022 introduces a lower financial threshold of £10,000 to register with the Electoral Commission for 'non-party political campaigners'.
  - Charities should also note that the relevant period for campaigning is 12 months before a general election and so it is possible to be within a relevant period and not know it until after the fact.
  - The Electoral Commission is currently running a consultation on a draft code of practice for non-party political campaigners as guidance is required for new groups that may not have previously needed to consider these rules. Existing Electoral Commission guidance can be found here: https://www.electoralcommission.org.uk/non-party-campaigners-where-start.
- Charities and campaigning activity generally has been a hot topic in the sector, with the RSPB and other environmental charities being criticised by some last autumn for encouraging members to contact their MPs to condemn what they described as an 'attack on nature' by the UK government, and the pending tribunal relating *the Mermaids v the Charity Commission*, alleging that fellow charity LBG Alliance was formed for political or campaigning purposes.
- Commission chair Orlando Fraser explained that charities should be 'part of th[e] conversation' about what is needed from the UK government, and that the law clearly states that 'charities are free to campaign and engage in political activity in this way, shining a light on uncomfortable truths, engaging with those in power in the interests of the people and causes they serve'. However, Fraser warned charity leaders that it is not their personal voices or opinions, but the interests of their charities, that must be furthered by any political campaigning.

Charities review of the year 2023

The Charity Commission

- The Commission published its business plan for 2022-23: https://www.gov.uk/government/publications/charity-commission-business-plan-2022-to-2023/charity-commission-business-plan-2022-to-2023
- The My Charity Commission Account service will launch this year: https://charitycommission.blog.gov.uk/2022/11/08/your-new-charity-commission-account/
- Increased number of questions for charities' annual returns following proposals for changes: https://www.gov.uk/government/consultations/charity-commission-revisions-to-the-annual-return-2023-25. Withers' response to the consultation can be found here: https://www.withersworldwide.com/en-gb/insight/read/withers-responds-to-consultation-of-charity-commission-of-england-and-wales-on-annual-return-2023-25
- The Charity Commission published a new short guide to supplement the existing long-form guidance on political campaigning for charities (CC9)
- Updated Commission guidance on emergency appeals (CC40), charity fundraising (CC20), trustees expenses and payments (CC11), conflicts of interest (CC29) and responsible investment (CC14) following the implementation of sections of the Charities Act 2022.
- The Commission is also expected to update its guidance on investment by charity trustees following the outcome of *Butler-Sloss v Charity Commission*: https://www.gov.uk/government/publications/charities-and-investment-matters-a-guide-for-trustees-cc14

Cost of living crisis

- The Commission has rightly acknowledged its very important role in helping charities weather the storm of the cost-of-living crisis, with donations likely to decrease while demand on charities increases.
- UK inflation was already running at 5.4% last January and had nearly doubled to 10.8% at the end of November. Against this economic backdrop we saw charities trying to cover their own rising costs while managing increased demand from beneficiaries needing charity services. The Charities Aid Foundation estimated the nearly five million fewer people donated to charity in early 2022 compared to the same period in 2019 and so many charities are having to do more with less.
- The Commission has published new guidance to help trustees facing difficult decisions regarding their charity's financial position: https://www.gov.uk/guidance/manage-financial-difficulties-in-your-charity-arising-from-cost-of-living-pressures.
- NCVO (National Council for Voluntary Organisations) has put together some resources for charities to support them through the cost of living crisis: https://www.ncvo.org.uk/help-and-guidance/running-a-charity/current-events-impact/cost-of-living/#/.

Devolved nations

- Northern Ireland – the Charity Commission for NI is running a 12-week consultation which ends on 6 February 2023 on its strategic plan and engagement strategy, following the independent review of charity regulation in N. Ireland.
- Scotland – the Charities (Regulation and Administration) Bill was introduced to the Scottish Parliament in November 2022, which aims to increase the transparency and accountability of charities to the public. Key proposals include:
  - Charity trustee names to be published on a public register (including removed trustees)
  - Creation of a register of merged charities
  - Charities must have a connection with Scotland (operations/trustees/base etc.)

Charities review of the year 2023

- Increased powers for OSCR (Scottish charity regulator) including the ability to publish charity annual accounts online, ability to remove charities from the register for failure to provide accounts or lack of response to regulator communications, and the power to issue 'positive directions' to charity trustees (ie requiring them to take action) where appropriate.

Responsible investment

- The judgement in *Butler-Sloss and Ors v the Charity Commission* confirmed that charity trustees have a wide discretion when considering investment strategies and can exclude certain investments based on non-financial considerations, although this is subject to factors such as what the charity's governing document permits (or prohibits) and the objects of the charity.
- There are ongoing updates and discussions in the sector following the judgement in *Butler-Sloss and Ors v the Charity Commission*. The judgement confirmed that charity trustees have a wide discretion when considering investment strategies and can exclude certain investments based on non-financial considerations, although this is subject to factors such as what the charity's governing document permits (or prohibits) and the objects of the charity.
- Trustees must balance 'all relevant factors' when determining their investment approach, including: the likelihood and seriousness of the potential conflict of any investment action with the charity's objects occurring; the overall financial impact of including or excluding particular investments, which includes considering the risk of losing donors and potential damage to the charity's reputation.
- The relevant Charity Commission guidance (CC14) was updated in November 2022 following the judgement – however, the changes to the guidance have been criticised by the two claimant charities in the Butler-Sloss case as inviting trustees to 'wilfully, recklessly or negligently disregard their obligations' as well as being 'inaccurate and in unlawful and vulnerable to challenge by way of judicial review'.
- Further updates to the guidance are expected in 2023 and there may be further legal challenges.
- For a more in-depth review of the judgement see our e-alert article here: https://www.withersworldwide.com/en-gb/insight/read/england-and-wales-high-court-judgement-butler-sloss-ors-v-charity-commission.

Kids Company

- The highly publicised collapse of Kids Company has been a long-running saga; more recently, the conclusion of the High Court case brought by the Official Receiver in February 2021 (with the High Court finding no mismanagement by the trustees or founder Camila Batmanghelidjh) meant that the Commission was able to publish its inquiry into the charity in February 2022.
- The High Court judgement dismissed the Official Receiver's claim that the trustees were unfit to act as charity trustees or company directors again, and praised the 'care and commitment [the trustees] showed in highly challenging circumstances'.
- However, the Commission (noting that the test for determining that a person is unfit to act as a director is a higher threshold than the Charity Commission would consider as misconduct or mismanagement) determined that there had been mismanagement by the trustees although did not find any evidence of dishonesty, bad faith, or inappropriate personal gain in the way the trustees managed the charity.
- The charity's founder Camila Batmanghelidjh was permission to proceed to seek judicial review of the Charity Commission's approach in December 2022, arguing that its inquiry lacked a proper evidential basis and that the Commission was determined to produce a report critical of the charity.
- For a more in-depth review of the inquiry see our e-alert article here: https://www.withersworldwide.com/en-gb/insight/read/england-and-wales-charity-commission-releases-result-of-inquiry-into-kids-company.

Charities review of the year 2023

The Fundraising Regulator

- The Fundraising Regulator has published a new five year strategic plan which includes a major update to the Regulator's Code of Fundraising Practice: https://www.fundraisingregulator.org.uk/more-from-us/news/fundraising-regulator-unveils-its-new-five-year-strategic-plan-2022-27.
- The Regulator has also published its annual complaints report: https://www.fundraisingregulator.org.uk/complaints/annual-complaints-report.
- In March 2022, the Regulator launched the self-reporting pathway: https://www.fundraisingregulator.org.uk/more-from-us/self-reporting.

Economic Crime and Corporate Transparency Bill

- The Economic Crime and Corporate Transparency Bill is likely to come into effect either this year or in 2024. The aim is to tackle economic crime and assist with preventing money laundering.
- The Bill will introduce identity verification requirements for companies – this will cover charitable companies and charity trading subsidiaries and will grant additional powers to Companies House to carry out such processes (including identity verification, see below).
- Anyone setting up, running, owning or controlling a company in the UK will need to verify their identity. Existing companies will eventually need to comply with the verification requirements within a set time period to be set out in secondary legislation. There are both criminal and civil sanctions for non-compliance.

Safeguarding

- The Independent Inquiry into Child Sexual abuse – final report published in November last year. The inquiry involved 325 days of public hearings, over two million pages of evidence, and hearing from 725 witnesses and over 7,300 victims and survivors.
  - Recommendations in the report include: introduction of a new cabinet Minister for Children; improved compliance with the DBS service and extending the DBS regime to those working with children overseas; and the introduction of mandated reporters – that is people who would have a legal obligation to report child sexual abuse where witnessed, disclosed or indicated.
- Disclosure and Barring Service – updated guidance for the charity sector and for overseas aid organisations published in 2022, with two new fact sheets on 'Working with children in the charity sector and overseas aid organisations' and 'Working with adults in the charity sector and overseas aid organisations'.

Crypto assets

- We are aware of increasing numbers of charities looking to engage with crypto assets, primarily by accepting such assets as donations (including legacies).
- The Charity Commission published a blog about charities and crypto last summer and while the Commission expresses that it 'wants to help promote innovation in charities' it does warn charity trustees of the 'real risks in engaging with crypto assets', as crypto assets are volatile and values can fluctuate.
- Crypto assets are generally not regulated (although the FCA has oversight to check that crypto asset firms have effective anti-money laundering (AML) and terrorist financing procedures in place).
- Charity trustees should consider:
  - Is accepting crypto donations in the best interests of the charity?
  - How will crypto donations be accepted? Do trustees have the expertise to manage these assets?
  - Relevant know your donor (and know your asset) considerations.
  - Updating policies to manage crypto donations and legacies.
- Further regulation in this area is expected and there are plans for example for a consultation on a new regulatory regime for the cryptocurrency industry.

Charities review of the year 2023

Some predictions for 2023

- Charities to grapple with the completion of the new Charity Commission annual return.
- Further implementation of Charities Act 2022 provisions in spring and autumn 2023.
- Ongoing challenges for charities due to inflation and the cost of living crisis.
- Increased regulation in the crypto asset sector.
- Introduction of mandated reporters following the Independent Inquiry into Child Sexual Abuse (IICSA).
- A tribunal decision on *Mermaids v Charity Commission*.
- Further debate on Charity Commission guidance on responsible investment.
- Further government policy (and potentially legislation) on the Protect Duty.
- Continuing debate on the charitable status of (and tax reliefs for) independent schools.
- Judicial review proceedings regarding the Kids Company inquiry.

Key legislative changes/ upcoming legislation

- Retained EU Law (Revocation and Reform) Bill
- Online Safety Bill
- Data Protection and Digital Reform Bill
- Economic Crime and Corporate Transparency Bill

Implementation of the Charities Act 2022

- Expected in spring 2023 are (most notably) new provisions on permanent endowment and disposals of charity land.
- There will be a new definition of 'permanent endowment' for the purposes of the Charities Act. This will be used in the context of the somewhat simplified powers to release permanent endowment restrictions under the Act. There is also a new power for charities to borrow from permanent endowment without Charity Commission approval (up to 25% of the total value of the endowment may be borrowed, and must be fully repaid within a maximum of 20 years).
- The rules around disposals of charity land are to be simplified and made more flexible. Trustees are (inter alia) required to take advice to ensure that the terms of disposals are the best that can reasonably be obtained. The new regime will be less prescriptive on the content of this advice, and there will be more flexibility about who is able to provide it (currently the adviser must be a qualified surveyor). Trustees will also only need to take into account the relevant adviser's advice on advertising the land; currently they must follow this element of the advice.
- Expected in autumn 2023 are provisions on (inter alia) powers to amend charity constitutions, powers in relation to the appointment of trustees, remuneration of trustees for work done for the charity, and some helpful improvements to the register of charity mergers.
- Provisions on ex gratia payments were due to come into force in autumn 2022 but have been placed on hold. This is due to the government wishing to look more closely at the scope of the new powers, amid wide discussion that they may have allowed national museums and other institutions to give away significant items from their collections, such as in cases of restitution of cultural assets.

Retained EU Law (Revocation and Reform) Bill

- Absent specific saving action, all EU-derived subordinate legislation and retained direct EU legislation is due to be revoked on 31 December 2023 (known as the 'sunset date').
- The 'sunset date' can be delayed for specific pieces of legislation by a ministerial decision (rather than by MPs) to no later than 23 June 2026.

Charities review of the year 2023

- Any legislation which is selected to remain in force by the 'sunset date' will be assimilated into domestic law (with EU law features removed).
- Over 3,000 pieces of UK legislation are likely to be affected.
- The UK Government dashboard provides how many pieces of retained EU law relate to each government department (the government accepts that this dashboard is likely to expand over time): https://public.tableau.com/app/profile/governmentreporting/viz/UKGovernment-RetainedEULawDashboard/Guidance.
- Charities are encouraged to raise issues relating to specific pieces of legislation with their MP or through other appropriate channels, seeking advice where necessary.
- Charities are also encouraged to consider whether they should be making entries onto their Risk Register to cover potential gaps in legislation caused by the removal of legislation they once relied on.

To find out more about how we can help you, please contact:

Chris Priestley | Partner
+44 20 7597 6135
chris.priestley@withersworldwide.com

Alison Paines | Partner
+44 20 7597 6057
alison.paines@withersworldwide.com

Phil Reed | Partner
+44 20 7597 6650
philip.reed@withersworldwide.com