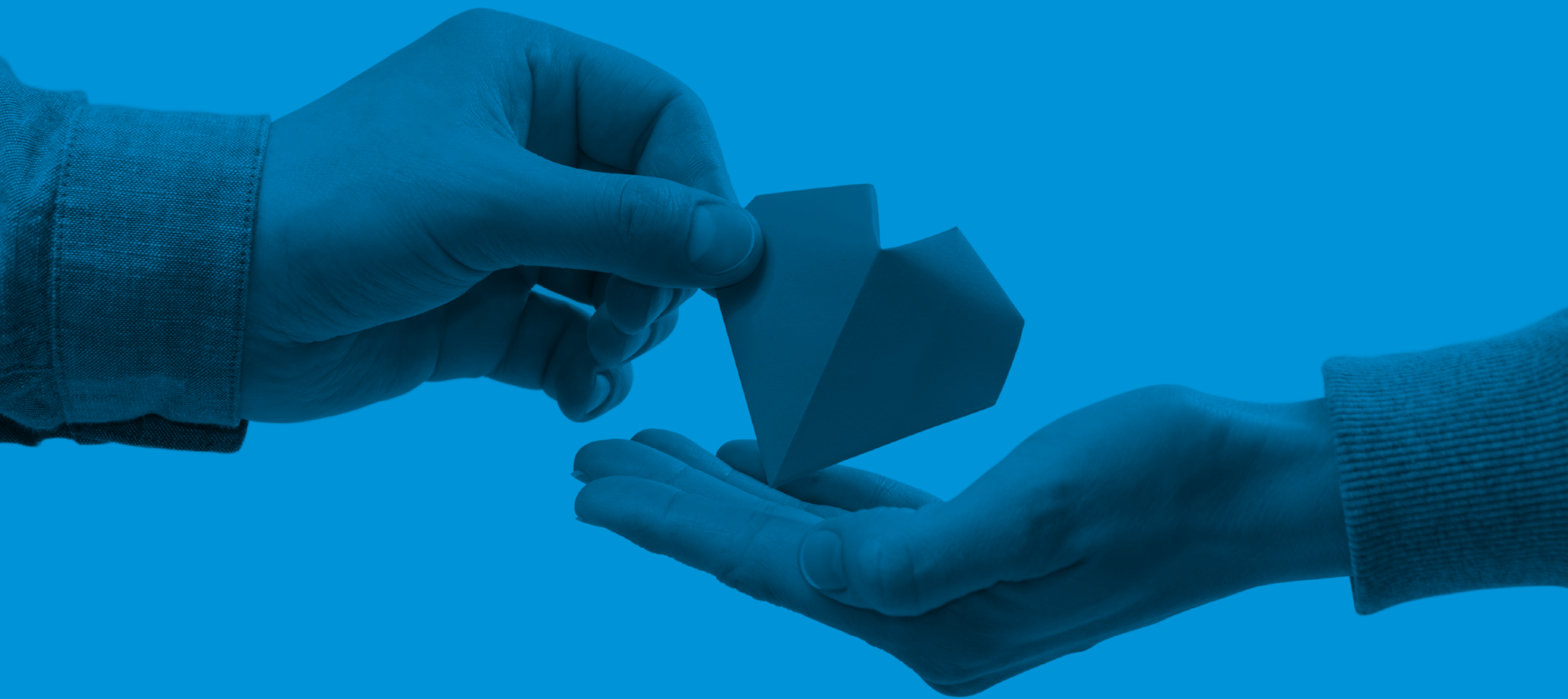

May 2023.

Charities & Non-profit newsletter

Charities Act 2022 - the next instalment

We have been reporting regularly on the implementation of the Charities Act 2022 and in January 2023 we reported on changes that came into force in October 2022. In April 2023 the Charity Commission published a further update covering three key areas for implementation in spring 2023. Further guidance is expected on each of these matters when they come into force.

Selling, leasing or otherwise disposing of charity land

The Act will simplify some of the legal requirements around disposing of charity land, through sale, transfer or lease. The changes include:

- Widening the pool of people qualified to provide charities with advice on disposals, including clarification that this can be a trustee if they are suitably qualified
- Discretion over how a proposed land disposal is advertised
- Removing the requirement for Charity Commission approval for certain short or fixed term leases to employees
- Clarifying legal requirements which apply when the disposal is to another charity
- Updating the statements and certificates which must be included in disposal or mortgage documentation for charity land.

Permanent endowment

The key changes are for charities:

- to be able to spend, in certain circumstances, from smaller endowments funds of less than £25,000
- to be able to borrow up to 25% of the value of their permanent endowment, without Charity Commission authority, but with plans over how the amount will be repaid.

Those charities taking a total return approach to investment will be able to use permanent endowment to make social investments with a negative or uncertain financial return, providing any losses are offset by other gains.

Charity names and connected persons

The Act will enable the Charity Commission to delay registration of a charity with an unsuitable name, and also to direct a charity to stop using a working name, if it is offensive or misleading. The Commission will also be able to use these powers, in consultation with the Principal Regulator, for exempt charities.

In addition, the definition of connected person will be updated to remove outdated language. Trustees should remember that connected persons include family members, companies controlled by a charity trustee, companies in which a charity trustee has at least 25% interest and business partners of charity trustees. This wide definition means that trustees need to be very conscious of potential relationships when declaring and managing conflicts.

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Cryptoassets & modern fundraising

The new guidance on internal controls issues by the Charity Commission in April 2023 includes some helpful guidance on cryptoassets, including what they are (cryptocurrencies and non-fungible tokens (NFTs)); and the risks that may be associated with them, such as volatility, potential for fraud, anonymity, ability to use them.

The guidance emphasises the legal duty of trustees to manage their charity's resources properly.

Where that involves new products such as cryptoassets, trustees should make sure they have assessed the risks of holding such assets and the limitations of using them prior to accepting the donation.

Charity Commission guidance gives trustees discretion to make the difficult decision of whether to accept or refuse a donation, based solely in the best interests of the charity.

Further guidance is available on knowing your donor Charity Commission guidance.

Trustees may decide to develop a policy not to accept cryptoasset donations on considering:

- the risks around such new and volatile assets
- the potential for fraud
- the anonymity of the donor
- the lack of protection compared to traditional currencies or financial products (since cryptoassets are largely unregulated charities are very unlikely to have access to the Financial Services Compensation Scheme (FSCS) or the Financial Conduct Authority (FCA) if something goes wrong)
- the potential to get it wrong due to laws on cryptoassets varying between countries (for example cryptoassets are banned in some countries and other countries have complex regulatory requirements)
- the limit uses for the asset (for example in a retail setting)
- the expertise needed to management the risks.

However, if cryptoasset donations are accepted, Charity Commission guidance sets out that a charity should:

- adopt a policy on accepting, refusing and using cryptoassets, including how you make decisions about converting them to traditional currency
- if your charity is receiving donations directly in its crypto wallet, ensure the platform you are using is compliant with UK regulations and registered with the FCA for anti-money laundering and counterterrorism as required
- keep accurate records of donations, storage and use
- make sure you follow HMRC's guidance on the taxation of cryptoassets
- remember that you cannot claim Gift Aid on any cryptoassets
- review the benefits to your charity of accepting cryptocurrency versus the risk
- regularly review your policies on them.

If your charity is currently considering their policy further advice on the risks of using cryptoassets can be found on the FCA website and FSCS advice on cryptoassets is available on the financial services compensation scheme website. Expert advice is recommended.

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Payments to volunteers

As the cost-of-living crisis continues its squeeze on the charity and not-for-profit (NFP) sector, the importance of assistance from unpaid volunteers increases. This can range from charity shop volunteers to non-executive directors and council members. Sometimes organisations operating in this sector may wish to show appreciation for these invaluable volunteers, perhaps via a small honoraria or ex-gratia payment as well covering expenses incurred.

As volunteers are not considered employees, many charities and NFPs look to pay all such amounts gross outside the "normal" PAYE system and do not consider whether there may be any payroll reporting requirements. Payments to volunteers are a complicated area of tax.

If a volunteer incurs necessary expenses in carrying out their voluntary work and is either paid in advance or reimbursed for those expenses **and nothing more**, the expenses or reimbursements are not taxable nor subject to National Insurance Contributions (NIC). Similarly, if the organisation for which the volunteer works makes reasonable payments to cover expenses which the volunteer would not otherwise have incurred, such as the cost of travelling from home to the place where the voluntary work is done, there is usually no income tax or NIC due, depending on the rates paid. Sometimes HMRC's scale rates are used to cover volunteers' travel and subsistence costs, as these are accepted by HMRC as being 'reasonable' and should not of themselves trigger any argument from HMRC that there is profit element to the amounts paid.

However, a common area of contention with HMRC is whether any profit element arises to volunteers on the reimbursement of expenses to them by means of any other round sum allowances (see further below). To avoid adverse tax consequences, expense reimbursement should do no more than reimburse the volunteer for the expenses actually incurred in doing their work.

Volunteers offered reimbursement of expenses from a charity may choose to waive those expenses or wish to gift them back to the charity. The most tax-efficient way of doing this is for the volunteer to receive the expense payment and then to gift it back to the charity as a gift aid donation. For Gift Aid to apply, there must be an actual payment donated to the charity; a waiver of expenses does not involve a payment and so would not count.

From April 2020, treatment of expenses, as free of income tax and NIC for unpaid officeholders, is on a statutory basis. HMRC's guidance provides that such individuals *"will not have any taxable earnings unless it can be shown that the office holders are being remunerated for their services"*. HMRC guidance to its inspectors states that if the sums involved *"are small, they should not spend time examining the amounts paid to such officials to compensate them for the extra expenses they incur as a result of holding office"*. These principles are intended to apply to small amounts of travelling and subsistence

payments, rather than regular small payments for undertaking the role. There is no guidance on the meaning of small!

National Minimum Wage (NMW) and National Living Wage (NLW) legislation does not apply to voluntary workers employed by a charity, a voluntary organisation, an associated fundraising body or a statutory body. However, it does apply to anyone doing work or providing services on a voluntary basis who receives any form of payment or reward over and above expenses actually incurred. The Gov.uk website includes examples showing that even paying a flat rate nominal travel allowance to a volunteer who actually incurs no travel expenses, could bring that volunteer into the scope of the NMW/NLW.

It is therefore crucial that charities and NFPs using voluntary workers should not pay blanket allowances to all volunteers, without checking that the individual volunteers have incurred the expenditure intended to be covered by the allowance. The NMW/NLW legislation does not apply to office holders working on an unpaid voluntary basis.

When a charity or NFP wishes to pay more than described above, there will likely be tax and NIC issues, and possibly NMW/NLW issues. For an honorarium, or similar payment such as an ex-gratia payment, to be considered employment income subject to PAYE tax and NIC:

- the individual needs to hold an office or employment
- the payments or other benefits received must arise from that office or employment - usually as reward for services provided.

If a volunteer holds a position in a charity such as secretary, treasurer or chairperson, this will usually be deemed an office by HMRC as such positions usually have a continued existence over time. If the office-holder receives anything other than reasonable reimbursement of expenses, any such payments or benefits are likely to be seen as employment income and, depending on the sums involved, HMRC will likely argue that the amounts received should be paid via the payroll and subject to both PAYE and Class 1 NICs.

The payroll position of notional payments to non-office holders is more difficult to determine as it depends on their employment status and whether they may be deemed to hold an office or employment. For example, a non-executive director or council member may receive a gross annual payment, essentially as a “thank you“ which bears no relation to the amount of their time commitment. HMRC may contend that the individual is an office holder and that payments to them should have been processed through the payroll.

Charities and NFPs should ensure that they have a thorough expenses policy in place and used in practice to ensure that unexpected issues do not arise. Any payments made over and above the reimbursement of expenses should be treated correctly for tax purposes as well as considering any issues due to the organisation’s charitable or NFP status.

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Know your volunteer

A judgment of Shrewsbury Crown Court, at the start of May, jailed a woman for two years for stealing almost £39,000 from a church in the nine months from September 2018 to June 2019.

Despite being new to the congregation, Dowe took up the post of volunteer treasurer. With access to the church credit cards she was able to fund a lavish lifestyle which was only identified when officials at the church asked to see the accounts. The church made no checks prior to Dowe taking up the position.

During her trial at Shrewsbury Crown Court, Suzanne Francis prosecuting, said that Dowe had been jailed in 1991 for obtaining property by deception. She was also convicted for a complex fraud operation in Wolverhampton in 2010, which saw her jailed for 18 months.

This is an expensive reminder that not all volunteers have the best interests of the charity in mind when accepting posts.

Basic checks such as asking for a CV, a declaration from the volunteer and requesting references are a good start. Due to the nature of the position handling finance, the charity might request that the role comes with a basic DBS check. Basic DBS checks can be used for any position or purpose, and cost £18 for all applicants, including volunteers. A charity cannot run a check without the permission of the volunteer.

There is more guidance available on the government website on the disclosure and application process for volunteers. Although not relevant in this case, certain roles may require a higher level of check. More information about eligibility can be found in the DBS eligibility guidance. In particular, those working with children and vulnerable adults should have enhanced DBS checks suitable for their role.

Guidance on safeguarding for Charities and Trustees can be found on the Charity Commission website.

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Budget 2023 update

Creative sector reliefs

Extending the higher rates of Theatre Tax Relief (TTR), Orchestra Tax Relief (OTR) and Museums and Galleries Exhibitions Tax Relief (MGETR) for 2 years – The temporary higher headline rates of relief for TTR, OTR and MGETR will be extended so that from 1 April 2023, the headline rates of relief for the TTR and the MGETR will remain at 45% (for non-touring productions) and 50% (for touring productions), whilst OTR rates will remain at 50%.

From 1 April 2025, the rates will be 30% and 35% and on 1 April 2026, the headline rates of relief for TTR and MGETR will return to 20% and 25%. The headline rates of relief for OTR will return to 25%.

Extension of the MGETR sunset clause – MGETR will be extended for a further two years until 31 March 2026.

Qualifying expenditure in theatre, orchestra and museums and galleries exhibitions tax reliefs – Qualifying expenditure for theatre, orchestra museums and galleries exhibition tax reliefs will be changed to 'expenditure on goods and services that are used or consumed in the UK.' This will align the cultural reliefs with the audio-visual reliefs and ensure these reliefs remain compliant with the UK's international obligations. Productions that have not concluded by 1 April 2024 may continue to claim EEA expenditure until 31 March 2025.

Social Investment Tax Relief

Social Investment Tax Relief (SITR) expiry – SITR will be allowed to expire in April 2023. New investments made on or after 6 April 2023 will no longer qualify for Income Tax and Capital Gains Tax relief.

EU and EEA charities

This measure will change the tax definition of a charity or CASC (Community Amateur Sports Club). Currently charities or CASCs located in the UK, EU or the EEA could qualify for charitable tax reliefs in the UK.

The measure will change this for charities so that only those that come within the jurisdiction of the High Court in England, Wales or Northern Ireland, or the Court of Session in Scotland will qualify for UK charitable tax reliefs.

For CASCs, it will change the location condition so that the CASC must be based in the UK and provide facilities for eligible sports in the UK.

This measure takes effect from 15 March 2023 for any charity or CASC that has not asserted their status for charitable tax reliefs. For non-UK charities and CASCs that have asserted their status for charitable tax reliefs on 15 March 2023 there will be a transitional period until April 2024. From April 2024, all non-UK charities and CASCs will no longer be eligible to claim UK charitable tax reliefs.

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Charity Commission accounts

The Charity Commission published information on its new accounts access in November 2022. The first stage of the implementation, currently planned from November 2022 to summer 2023, is to pilot the access to the new accounts with a small number of charities. During phase 1, the key contact for the charity will be invited to set up an admin account. From that account they will be able to control access for other charity contacts and the trustees.

The Charity Commission recommends that any charities using a shared email address, such as 'info@charityname.org.uk' for both the charity contact and trustees, should change this to individual email addresses used by one person only. This can be done via the Charity Commission **update charity details** service and the Commission believes that this will make setting up your individual accounts in phase 2 much easier (**What email address should I use?**) and will help you keep your information secure.

The new accounts will enable a charity to establish administrator accounts, trustee accounts and third-party accounts allowing different levels of access to charity data and Charity Commission services. Where individuals use the same address, it is intended that they will have one account with links to the data of all the charities they are connected to; if separate addresses are used for each charity, then a separate account will be required for each separate email address. So when setting up accounts, trustees and charities will need to agree whether 'charity addresses' should be used, or whether it is acceptable for trustees and contacts to use personal email addresses.

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Understanding internal controls

Internal financial controls for charities (CC8) has long been the "go to" guidance on basic internal controls that the Charity Commission expect to be in place. This guidance was updated in April 2023 to reflect the increasing use of the internet for banking, donations and other transactions.

It covers alternative banking arrangements and cryptoassets to highlight areas where trustees may not be sure that they have addressed risks and questions that a 21st century charity may be addressing. (Some of the risks around cryptocurrency are explored at the start of this newsletter). Funds transferred using alternative banking methods have recently been included in the annual return so additional questions around controls match that development.

The style of the checklist has changed to reflect key areas of control and supervision and should be logical for trustees and management to complete. Although the questionnaire has yes/no responses to its questions, we would advise all charities to document why they are satisfied the response is a yes, and develop an action plan where there is a no that is relevant to the activities of the charity. If the charity has activities that the trustees do not feel are covered by the checklist or their current risk assessment, procedures then they should be supplementing the questions for those areas.

The first section covers **general principles** for all charities – questions to establish how well trustees understand the financial controls in place and their duties. Questions focus on:

- understanding whether the controls are appropriate (requesting professional advice if unsure)
- understanding the charity's financial information and the methods of monitoring
- keeping track of the reporting
- understanding whether controls are embedded in the organisation
- carrying out an annual review of the controls – internally or with the help of internal audit
- ensuring appropriate segregation between roles
- ensure that procedures are in place for reporting suspicious incidents

The next section covers **operational risks**. The key points here are around understanding whether there is sufficient training and knowledge of policies by trustees, staff and volunteers, including an understanding of:

- why the charity is at risk from financial crime
- what the rules are around hospitality, acceptance of donations, register of interests, managing conflicts
- how the charity controls access and storage of data

Following the overview, there were some more detailed questions around **internal financial controls for banking**. These cover how bank accounts are opened, reconciled and monitored.

As a development from the previous CC8, there are questions relating to online banking around security of electronic devices, management of passwords (and PINs) and understanding who is approved to access passwords and PINs.

The **income** section works through challenging trustees and management to identify whether they have controls to manage the completeness and accuracy of income recognition from all sources, and the ongoing security of that asset:

- donations (including procedures around 'tainted charity donations')
- public collections and fundraising events
- received online and via card readers
- through the post
- donations of cryptoassets
- trading income
- legacies whether gift aid is claimed wherever possible.

The flow of the **expenditure** section is also updated to reflect the potentially increased levels of payment being made by individuals rather than through central purchasing and finance systems.

They are updated for services such as Google Pay and Apple Pay. For all methods where control over purchasing is effectively delegated to the individual, charities must be sure that clear policies are in place and have appropriate oversight as these delegated processes give increased scope for an individual to commit an unwary charity without authorisation.

This section also includes questions around paying wages, salaries, expenses, grants and handling related party transactions.

The key here is having clear policies in place around identifying and managing conflicts and subsequent related party payments that can be followed.

Internal financial controls for assets and investments comes next with questions covering use of assets, registers and insurance.

It also touches on GDPR controls and controls over the use of restricted funds and endowment, if your charity has those funds.

Investments is encapsulated by an understanding of Charities and investment matters: a guide for trustees CC14 trustee duties when investing charity funds.

Finally there are questions on:

- loans
- hospitality
- internal audit and audit committees

Trustees have a legal duty to manage their charity's resources responsibly, including implementing appropriate financial controls and managing risk. Increasingly, charity auditors, independent examiners and others will hold them to account and ask to see their assessment and understand that judgment. This demands more than a feeling, or a general assurance from those two which financial controls have been delegated. The guidance accompanying the CC8 checklist recommends that charities that are required to have an external audit, should have an internal audit committee. This assessment of internal controls may be one of its tasks.

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Double default

In May 2023, the Charity Commission published its latest report on charities investigated as part of the double default analysis. Charities selected, that are in default of their statutory obligations to meet reporting requirements by failing to file their annual documents for two or more years in the last five years and meet certain criteria, will receive a warning from the Commission and a deadline to submit their outstanding documents. This is the pre-inquiry phase.

Of the charities investigated in the year to March 2023, 40 charities accounting for £23m of funds submitted their documents.

For those who continue in default, an inquiry is opened as default is often found by the Commission to be symptomatic of further mismanagement.

30 charities reflecting just over £12m of funds appropriately updated and submitted their documents in the inquiry phase. 15 charities were found to have ceased to exist or operate, and were therefore removed from the register, and 6 were referred for further inquiry.

Press releases accompanied the inquiries opened which included concerns:

- in relation to online material and political campaigning which did not further the charity's purposes, and consequent concerns over the use of social media and whether charitable funds had been appropriately spent
- over whether the charity was operating in line with its objects
- over whether the management of the charity was in accordance with its constitution
- whether financial weaknesses were due to trustee misconduct and/or mismanagement.

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If you need further advice on any of the topics raised in these articles please contact your usual PEM contact or any of the Charities and non-profit team members

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