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Pulse

Deloitte's Charities and Not for Profit Group Newsletter

Happy New Year to all our readers. 2017 was another busy year for the sector involving the introduction of yet more regulatory compliance. Already 2018 is promising to continue the trend and we expect it to be dominated with compliance with GDPR.

As ever, this edition has varied articles on a number of areas and we are sure you will find them of interest.

Thanks for reading!

Please note that the views expressed in this publication are those of the authors and not of Deloitte. In the complicated environment in which we all operate, always seek professional advice specifically and don't rely on contents of articles that have been written for general guidance only.

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Law Commission – proposed changes to Charity Law

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43 recommendations
Increased flexibility
Additional Charity Commission powers.

The Law Commission was established by the Law Commission Act 1965 and is responsible for keeping the law under review with a view to its systematic development and reform, including elimination of anomalies and general simplification and modernisation of the law.

It has been working on a number of projects in relation to Charity Law and has addressed some technical issues in charity law – reporting this September with proposed amendments to the Charities Act 2011.

Their final report produced 43 recommendations and a new draft Charities Bill has been prepared to remove unnecessary regulations and bureaucracy whilst ensuring proper oversight, increasing the flexibility of trustees to make decisions in the best interests of their charities, ensuring adequate protection of charity property, ensuing inconsistencies and complexities in the law and conferring wider or additional powers on the Charity Commission to increase its effectiveness.

The recommendations for charities include:

1. Giving charities more flexibility to obtain tailored advice when they sell land, and to remove unnecessary administrative burdens. This proposes expanding the category of designated advisers on property disposals, modifying the existing advice requirements to give more flexibility to trustees, reforming the regulations on disposals of charity land, and amending the definition of connected persons to exclude short residential tenancies to employees and to exclude wholly-owned subsidiaries.

2. Allowing charities to amend their governing documents more easily with Charity Commission oversight where appropriate, to include new powers for unincorporated charities to make changes to their governing documents – to align with the regime for corporate charities – certain amendments to this require Charity Commission consent to include altering a restriction making property permanent endowment and changes requiring a person's consent. Also to create some alignment of positioning when corporate and unincorporated charities wish to make changes to their charitable purpose.

   Royal Charter charities should have power to amend any provision (unless an express power of amendment is available) subject to Privy Council consent – to dispense with the requirement to print supplemental charters on vellum, to produce new guidance on process for amendments and to restructure governing documents to enable future amendment of matters without oversight.

3. Re fundraising if too little raised (i.e. under £120 per annum) to apply for other purposes without the need to contact the donor – and have the ability for a trustee resolution to direct funds to new purposes – suggested no Charity Commission oversight for trustee resolutions re small funds (up to £1000). To increase the level of flexibility to use permanent endowment, with checks in place to ensure its protection in the long term. There is recommendation for changes to existing powers to spend permanent endowment and a new power to borrow from permanent endowment, together with a new definition of permanent endowment. Also proposed is an additional power for trustees who have opted into the total return regime, to resolve that permanent endowment may be used to make social investments with a negative or uncertain financial return.

4. Payments to trustees (and connected persons) of reasonable remuneration for supply of goods as well as services. Regarding small ex-gratia payments the costs of seeking authorisation from the Charity Commission are often disproportionate to the value of payments, therefore it is recommended that charity trustees be given a power to make ex gratia payments that are small relative to the income of the charity without having to obtain authorisation from the Charity Commission and also to permit the delegation of decisions to make ex gratia payments.

5. To remove some legal barriers to merger i.e. to enable unincorporated charities that do not have a power to merge to amend their governing documents to allow them to have power to do so. Also to deal with the current anomaly whereby "shelf charities" are retained on the register to capture gifts by will that may otherwise fail. Reforms are being recommended to resolve this difficulty and reduce the need for charities to retain shelf charities.

6. Ability to give charity trustees advance assurance that litigation costs in the Charity Tribunal can be paid from the charity's funds.

Other recommendations would impact the Charity Commission powers

The Law Commission has also made some recommendations with regard to Charity Commission powers – the Commission has an existing power to require a charity to change its name if it is inappropriate, it is proposed to remove two limitations, one in respect of ability to delay registration of a charity to up to 12 months if its name is deemed inappropriate, and also to extend the power to "working names".

The Commission has an existing power to determine the identity of charity members. It is proposed to extent this to a power to determine the identity of charity trustees. It is recommended that a limited power be given to ratify invalid or uncertain trustee appointments in elections. This power will enable the Charity Commission to confirm the appointment or election of a trustee where there is uncertainty as to whether a particular person was properly appointed or elected.

Next steps

The next stage in the process will likely be that the government will publish an interim response to the Law Commission's report within the next few months with a full response within some months thereafter. There are question marks over how quickly this may be considered or implemented due to current government constraints, though it is viewed as beneficial for the sector for many of the changes to be made to provide some clarity and improvements to the 2011 Charities Act.

Employment Tax – challenges for the third sector

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HMRC and the government are increasingly focusing on employer compliance.

The government's responses to recent high-profile "employment status" tribunal cases involving Uber and other "gig economy" organisations, and the significant rise in the number and intensity of HMRC reviews of organisations' National Minimum Wage/National Living Wage ("NMW/NLW") compliance are evidence of this. Both are of relevance to third sector organisations, and particularly those which engage large numbers of individuals on a "casual" and/or low-paid basis.

Employment status

The engagement of casual workers can increase the risk of unexpected employment tax liabilities, to the extent that the engaging organisation incorrectly treat them as self-employed, when they in fact have employment status for PAYE purposes.

Casual workers present a particular risk in this regard where there is an implied "mutuality of obligation" between the worker and the engager (e.g. individuals are repeatedly engaged by the organisation such that a mutual expectation of work/payment is created). The degree to which individuals are under the control of the organisation in respect of the work they perform and are obliged to provide their personal service are also relevant as "indicators" of PAYE employment status.

Failure to correctly assess employment status will increase the cost of engaging with the worker going forward as well as giving rise to liabilities for the historical period of engagement (HMRC can typically go back six tax years). It is therefore very important that third sector organisations have robust processes in place for assessing employment status, both at the point of engagement and thereafter.

While tax employment status and legal employment status are technically separate considerations, it is very rare to have one without the other. Accordingly, where there is PAYE employment status, there is also likely to be an obligation to pay NMW.

National Minimum Wage

HMRC are responsible for enforcing NMW compliance and have increased their activity in this area significantly over recent tax years (for context, HMRC's NMW compliance budget was £13m for 2015/16 – for 2017/18, it is £26.3m).

The impact of HMRC's increased focus on NMW has already been noted in particular by a number of social care charities specifically in respect of carer "sleep-ins" with clients. It has historically been typical for employed carers to be paid a flat rate for the sleep-in. However, the government has clarified that they should be paid at least NMW for the hours they have worked (including hours spent sleeping).

In recognition of the significant historical liabilities that this could engender for social care organisations, the government has launched the "Social Care Compliance Scheme" ("SCCS") which is basically an NMW/NLW amnesty for such organisations. The SCCS will not minimise any historical or current NMW arrears owed by the organisation, but it will offer protection from penalties, and up to 12 months for the organisation to conduct a self-review of its compliance, with access to HMRC technical support.

The focus on NMW shows no signs of abating, and as such all third sector organisations (not just those involved in social care) should be proactive in self-reviewing their workforce and NMW/NLW compliance.

It should be noted that many employers fall foul of the NMW legislation not through the malicious underpayment of their employees, but through misapplication of the legislation. Organisations should therefore also take the time to ensure that they understand the rules and how they apply specifically to their workforce (e.g. there are different rules depending on how employees are paid).

If issues are identified, organisations will find themselves in a better position if they proactively approach HMRC. Where possible, organisations should consider whether to opt-in to the SCCS.

Revisions to annual returns

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The Charity Commission has proposed changes to the annual return which will increase the amount of data collected. A threshold has been set to assist the smallest charities and there will be a phased introduction of some questions with these new requirements. Charities should consider the new requirements carefully to assess whether their current information systems are able to track and monitor such data.

On 2 January 2018 the Charity Commission published its response to the September consultation on changes to the annual return. The consultation received 287 responses and, in summary, the Charity Commission recognised that for some charities the new questions will create an additional burden.

To help keep the burden to a minimum the Charity Commission confirmed that they would:

- modify some of the questions;
- provide clearer guidance on what information they are asking for;
- introduce some thresholds; and
- make some of the questions voluntary for the annual return for 2018 to give charities time to put in place systems to collect the information more easily with less burden for the annual return for 2019.

The response to the consultation confirmed the requirements for the annual return for 2018, which apply to charities' financial years ending on or after 1 January 2018, including which requirements are mandatory for 2018 and what information will be published on the charity's public register page.

Reduced requirements for 2018 annual return

Prior to the consultation, the 2018 annual return included additional questions in respect of gift aid and rate relief on premises. Following the consultation the question asking how much gift aid the charity claimed was removed as this information is already supplied to another government department. The Charity Commission will explore further with HMRC how bulk data relating to Gift Aid can be provided.

The question asking whether the charity gets rate relief on premises has also been removed because the question in its current form does not provide information for the Charity Commission to address the possible abuse of charitable status. The Charity Commission will continue to explore this issue.

A number of questions have been moved from the annual return to the 'update charity details' section. This relates to information, shown in the diagram below, which does not necessarily change on an annual basis, but when changed should be updated immediately so key records remain accurate.

2018 Annual Return Requirements

Title	Requirement/Question	Relevant for:	New for 2018?	Mandatory for 2018	Information published?
Part A – Charity Information					
General information	• Charity details up to date? • Financial period end date • Next financial period end date • Income • Spending	All Charities	No	Yes	Yes
Serious incidents	**• Have all serious incidents that occurred in the year been reported to the Commission?**	Income > £25,000	Yes	Yes	Yes
Fundraising	• Does the charity raise funds from the public?		No	Yes	Yes
	If yes, does the charity work with a professional fundraiser?		Yes	Yes	Yes
	If yes, does the charity have a written agreement with the professional fundraiser?	Income > £10,000	Yes	Yes	Yes
	If yes, does the charity work with a commercial participator?		No	Yes	Yes
	If yes, does the charity have a signed contract with the commercial participator?		No	Yes	Yes
Government funding	• Does the charity receive income from contracts or grants from central or local government?		No	Yes	Yes
	If yes, how many contracts and grants?	Income > £10,000	Yes	Yes	Yes
	If yes, total value of contracts and grants?		No	Yes	Yes
Income from outside of the UK	**• Does the charity receive income from outside the UK?**		Yes	Yes	No
	If yes, from which countries and how much?	Income > £10,000 (Note 1)	Yes	Yes	No
	If yes, specify the source and amount of income		Yes	Note 1	No
Operating and spending outside England and Wales	• Did the charity operate outside England and Wales		No	Yes	No
	If yes, which countries and total expenditure by country?		No	Yes	No
	• Did the charity transfer money outside England and Wales other than using the regulated banking system?		Yes	Yes	No
	• What methods to transfer money did the charity use and what was the value?	Income > £10,000	Yes	No	No
	• Does the charity have any monitoring controls in place to monitor overseas expenditure?		Yes	No	No
	• Are the trustees satisfied that the charity's risk management policy and procedures adequately address the risks to the charity arising from its activities and/or where it operates?		Yes	No	No
Trading subsidiaries	• Does the charity have any trading subsidiaries?		No	Yes	Yes
	If yes, are any of the charity trustees also Directors of any of the charity's subsidiaries?	Income > £10,000	Yes	Yes	Yes
Payments to trustees	• Were any of the trustees paid?		No	Yes	Yes
	• Were any of the trustees paid for a) being a trustee, b) providing any services, or c) in receipt of other benefits?	Income > £10,000	Yes	Yes	Yes
	• Were any employees formerly trustees of the charity?		Yes	Yes	Yes

Title	Requirement/Question	Relevant for:	New for 2018?	Mandatory for 2018	Information published?
Employees' salaries	• **Did any of your charity's staff receive total employee benefits of £60,000 or more?**	Income > £10,000	Yes	Yes	Yes
	• **Enter the number of staff for each salary band between £60,000 and £150,000, in bands of £10,000, and between £150,000 and £500,000, in bands of £50,000.**		Yes	Yes	Yes
	• **Total employee benefits of the highest paid employee.**		Yes	Yes	No
Financial controls	• Did your charity review its financial controls?	Income > £10,000	No	Yes	Yes
Grant making	• Is grant making the main way your charity carries out its purposes?	Income > £10,000 & CIOs (Note2)	No	Yes	Yes
Land and buildings	• Is the charity's land/buildings required to be used for charitable purposes?	Income > £10,000 & CIOs (Note2)	No	Yes	Yes
Safeguarding	• **Do any trustees, staff or volunteers work directly with vulnerable beneficiaries?**	Income > £10,000 & CIOs (Note2)	Yes	Yes	No
	• **If yes, have DBS checks have been carried out on these individuals?**		Yes	Yes	No
Part B – Financial Details	• No changes from annual return 2017 and 2016 questions	Income > £500,000	No	Yes	Yes
Part C – Attach accounts, Declaration	• Only change from annual return 2017 and 2016 questions is the requirement to note the role of the individual signing the declaration.	Income > £25,000	No	Yes	Yes

Source: Charity Commission

Requirements in blue are new and mandatory for 2018.

Note 1: For certain sources of income the Charity Commission has introduced thresholds for the level of disclosure required. Disclosure of the source and amount of income for certain categories is not mandatory until 2019. See more detailed information below.

Note 2: CIOs for whom this question is relevant.

New Requirements for 2018 annual return

As shown in the table above, the 2018 Annual Return requires the inclusion of significant new information. Requirements highlighted in blue are new for 2018 and mandatory.

One of these new requirements is the disclosure of **'income from outside the United Kingdom'**. Following the consultation the Charity Commission added a number of thresholds to ease the accounting burden for these disclosures.

Charities with an income of over £10,000 will be required to confirm the value of income by country, and for each country specify the source and amount of income. The different sources to be identified include:

a) Overseas Governments or quasi government bodies (including EU);

b) Overseas Charities, NGO's or NPO's;

Charities with an income between £10,000 and £25,000 will be required to report the total of individual payments from individual donors or institutions outside the UK (requirements c) and d) below) if those payments are 80% or more of the charity's gross income for the financial year.

c) Individual donors resident overseas; and

d) Overseas institutional donors/institutions (e.g. private company donations)

Charities with an income over £25,000 will be required to report on requirements c) and d), however after consultation the Charity Commission has stated that only the total value of individual payments over £25,000 would require reporting.

The sections of this question relating to other private institutions outside the UK (other than charities, NGOs and NPOs) and individual donors outside the UK are voluntary for the 2018 return, but will be mandatory from annual return 2019 onwards.

Another area including significant new requirements is **'operating and spending outside England and Wales'**. In addition to previous questions about total expenditure by country, the 2018 annual return requires information confirming whether the charity transferred money other than using the regulated banking system.

Detailed questions regarding the methods the charity used to transfer money (cash courier, other charities or NGOs/NPOs, Money Service Business, Informal Money Transfer Systems, Online payment methods, other), the value of those transfers and the monitoring controls in place to monitor overseas expenditure were originally proposed as mandatory for the 2018 annual return. However, following the consultation, these requirements have been included as voluntary for 2018 and only mandatory from 2019 onwards.

Following the consultation, the Charity Commission confirmed that certain information is required on the 2018 annual return, but will not be published on the Charity's public register, including income from outside the UK, operating and spending outside England and Wales, total employee benefits of the highest paid employees and safeguarding information.

An additional burden?

The majority of the additional information required for the 2018 annual return is already required by the Charity Statement of Recommended Practice (SORP). However, fewer than a third of charities (40,000 of 168,000) are required to complete accounts and reports that contain the information which the Charity Commission are seeking.

The Charity Commission recognises that this is the first time they have asked for information about income from outside the United Kingdom and money transfer methods outside England and Wales, and that some charities will need to make changes to their financial systems to collect and sort the information which is required. Therefore they have made those parts of the questions voluntary for the 2018 annual return and only mandatory from 2019 onwards.

The Charity Commission have considered the regulatory burden for charities which are not required to provide some of this information already and concluded that the inclusion of these questions is justified based on the risk factors identified in respect of charities.

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