

AUDIT, ACCOUNTING, FUNDRAISING AND GOVERNANCE: UPDATE MAY 2023

By Luke Holt, Nonprofit Partner

AUDIT AND ACCOUNTING UPDATES THE CHARITY SORP

The next iteration of the Charities Statement of Recommended Practice (SORP) is expected to be implemented from 1 January 2025, so for most NHS charities this will be applicable for the first time in the year ended 31 March 2026. Feels like a long way away, but when the SORP is applied for the first time it is “retrospectively applied” so this will require restatements for the comparative period (31 March 2025) and an opening balance sheet as of 1 April 2024. Suddenly not so far away!

Back in January 2022, the SORP Committee (the body responsible for developing the next iteration) issued an overview document that introduced four drafting aims as “themes” for the next SORP, as follows:

- Considering key readers and explaining social purpose
- Compliance with FRC requirements and changes since the last SORP
- Promoting consistency across the sector
- Relevant to charities and their socioeconomic context

and then provided more detailed context on eight drafting principles to underpin the next SORP.

Principle 1 - the majority of preparers using the SORP are volunteers, advisors or practitioners assisting smaller charities and so in writing the SORP keep the needs of smaller charities in mind and seek to provide clarity to enable practitioners to understand the requirements of, and good practice recommendations made by the SORP. As far as practicable and to the extent that accounting standards permit the SORP will be written with language and terminology that is clear and not overly technical to a practitioner who is otherwise familiar with basic accounting concepts and terms.

Principle 2 - to provide guidance to assist practitioners to prepare accounts that give a ‘true and fair’ view in accordance with current GAAP, including addressing any charity specific matters not addressed by GAAP.

Principle 3 - when making changes to the reporting and accounting requirements, to have regard to the potential impact of those changes on the public’s continuing support for the legitimate charitable endeavour and to the practical challenges of addressing public perception of charities’ reporting and accounting practices.

Principle 4 - to ensure that the narrative reporting requirements address the interests of the main users of the report and accounts.

Principle 5 - to innovate by introducing or changing reporting requirements where this is necessary to either assist practitioners or meet the needs of the main users of the report and accounts and to reduce the need for additional bespoke requirements by any charity law jurisdiction adopting the SORP.

Principle 6 - to disseminate good practice reporting where the SORP Committee recommends that this is in the best interests of the sector as a means of helping the wider charity sector and practitioners to meet the needs of the main users of the report and accounts.

Principle 7 - to reflect the requirements of charity law and company law as they apply to reporting and accounting by charities in those jurisdictions adopting the SORP.

Principle 8 - to take account in our decision-making on any changes to the reporting and accounting requirements and recommendations of the SORP of both the potential value of the information to the user and the demands placed on the preparer of making those changes or recommendations.

As we move into the period of time where a new draft SORP will be issued for consultation, it appears that areas such as “a further tiering of



charitable organisations by size for reporting” (where smaller NHS charities could see reduced disclosure, while larger entities could experience more PLC type reporting requirements), “future proofing the SORP for ESG, sustainability and digital innovations” and considering “comparability” (will the discussions around a “one page key facts statement for all charities” remain) will all need to come to the forefront and be concluded upon.

FRS 102 AND FRED 82

The financial reporting exposure draft (“FRED”) 82 from the FRC has just completed its consultation period, closing on 30 April 2023, in relation to its proposed changes to the UK accounting framework including FRS 102.

Underlying the Charities SORP is the Financial Reporting Standard applicable in the UK and Republic of Ireland (FRS 102). The SORP provides guidance for charities on how to apply FRS 102 in order to ensure that charity accounts are ‘true and fair’. FRS 102 also takes precedence over the Charity SORP.

In relation to Charities, and NHS charities specifically, it appears the proposed changes will have three key considerations for the future of NHS Charity Financial Statements:

- Incoming resources - FRED 82 proposes the introduction of a five-step model for revenue recognition in FRS 102. The model will be based on the requirements of IFRS 15 ‘Revenue from Contracts with Customers’, but with simplifications aimed at ensuring the requirements remain cost-effective to apply. NHS charities often have diverse sources of funding, including income from charitable grants, donations and legacies, where funds are given freely. However, some NHS charities also receive income from contracts which could be impacted by the FRED 82 updates. It is hoped that any update here will be accompanied with sector specific guidance for charities, alongside the SORP.
- Leases - Leasing requirements in FRS 102 are set to change significantly. An IFRS 16 ‘leases’-based model has been proposed, requiring lessees to recognise all leases on the balance sheet, subject to limited exemptions. This change could be very onerous, particularly for many small charitable companies that must apply FRS 102, whereas small corporates can opt to apply the less onerous FRS 105 instead. An on-balance sheet “right to use asset” which will then be amortised over the length of the operating lease is the likely outcome here for all NHS charities to consider.

- Other feedback - The FRED 82 consultation also notes that there may be changes to the length, complexity and detailed nature of the notes to the financial statements (further exemptions may be provided from drafting comparative notes in certain areas for example). This would be welcome news for many NHS charities, particularly those with complex fund structures including unrestricted, designated, restricted, endowment and special purpose funds.

THE CHARITIES ACT 2022

Through the Queen's speech on the 11th of May 2021, the government announced reforms to the Charities Bill that will have the effect of reducing the amount of bureaucracy faced by charities. This became law on 24th February 2022 and the Charities Act 2011 is now the Charities Act 2022. The provisions will be implemented on a staggered basis to allow time for the Charity Commission to update its guidance.

The main elements of the Charities Bill, which covers charities in England and Wales, will include:

Financial thresholds - Charity reporting requirements vary according to thresholds that currently exist. It is proposed that these should be reviewed regularly to reflect inflation. This would prevent an increasing number of smaller charities becoming subject to stricter requirements, or acquiring powers, which are not appropriate to their size. The Charity Commission aim to review these in 2022 and every 10 years thereafter.

Changing purposes and amending governing documents - Charities should be able to make changes as quickly and efficiently as possible, while retaining safeguards to ensure that any amendments are in the best interests of the charity and its beneficiaries.

The processes for amending a charity's governing document vary according to the charity's legal form. The Law Commission's recommendations would simplify those processes and align them across the different types of charity. They would also simplify the criteria which the Charity Commission considers when agreeing significant changes.

Cy-près schemes and the proceeds of fundraising appeals - Some charity fundraising appeals raise too much, or too little money to achieve the appeal's aim. The current law requires charities to contact donors to offer to return their donation if a fundraising appeal does not achieve its target. The effort to do this can be disproportionate to the size of the individual donations. A £120 threshold (per donor) has been recommended to strike a fair balance between protecting the donors and

reducing the administrative burden on a charity.

Acquisitions, disposals and mortgages of charity land - The law governing how charities dispose of land requires charities to follow certain rules when they sell, let or mortgage their land. They have agreed to simplify these including how certain universities and colleges dispose of land, aligning it with broader charity and trust law. This includes extending the range of specialist advisers able to provide advice.

Permanent endowment - In an effort to reduce bureaucracy and costs, the definition of a permanent endowment is to be reformulated to remove its inconsistencies and lack of clarity. The move to a £25,000 threshold to enable more endowments to be released will be welcomed and the power to spend 25% of the endowment with a 20-year repayment period (without approaching the Charity Commission first) will serve as valuable tools for Trustees.

Remuneration for the supply of goods and the power to award equitable allowances - The Act should be updated to allow Trustees to be remunerated for services and goods (currently they can only be remunerated for services). The Charity Commission should have a statutory power to award equitable allowances in situations where charity trustees must account for a benefit that they have received in breach of fiduciary duty.

Non-statutory ex gratia payments out of charity funds - The introduction of a new statutory power allowing trustees to make small ex gratia payments without having to obtain the prior authorisation of the Charity Commission, the Attorney General or the court; this will apply to ex gratia payments of up to:

(a) £1,000, in the case of a charity with a gross income in its last financial year of up to £25,000;

(b) £2,500, in the case of a charity with a gross income in its last financial year of more than £25,000 and up to £250,000;

(c) £10,000, in the case of a charity with a gross income in its last financial year of more than £250,000 and up to £1 million; and

(d) £20,000, in the case of a charity with a gross income in its last financial year of more than £1 million.

Charity and trustee insolvency - Managing a Charity's finances (CC12) should be revised. There are recommendations to provide more clarity over the availability of trust property. Property included within permanent endowments, special trusts, or restricted funds, which can meet the liabilities of an insolvent trustee, is no different whether the trustee is an individual or a charitable company.

Charity names - The Charity Commission already has a framework that enables it to take steps to protect charities from confusion arising from other charities with duplicated or very similar names. This would be extended to cover "working names" of charities as well as the main name of the charity and would extend the Charity Commission's powers to issue directions on charity names to unregistered and exempt charities.

The identity of a charity's trustees - The Charity Commission is to be given the power to ratify retrospectively the appointment or election of a person to a charity trustee role.

The Charity Tribunal and the courts - The Charity Tribunal should be given the power to make "authorised costs orders" in respect of proposed or ongoing Tribunal proceedings that would provide charity trustees with advance assurance that 1) costs already incurred or proposed to be incurred, and 2) costs ordered to be paid if the litigation is unsuccessful; can properly be paid from the charity's funds.

Further details on The Charities Act 2022 can be found on the GOV.UK website.

CC8 INTERNAL FINANCIAL CONTROLS FOR CHARITIES

On 26 April 2023, the Charity Commission, following a long consultation process, issued an updated version of its CC8 checklist and guidance on internal financial controls for charities. The previous version of CC8 was long overdue a refresh and this updated version has been "modernised" to include references to digital strategies, cryptocurrencies, new sources of income and the hybrid and electronic based working practices many NHS charities will have adopted since the Covid-19 pandemic.

NHS charities should be reviewing, and Board approving that, the organisations financial controls are fit for purpose on at least an annual basis and this new CC8 guidance and checklist can serve as an additional resource when undertaking this review. The full version can be found at the following link: <https://www.gov.uk/government/publications/internal-financial-controls-for-charities-cc8>

FUNDRAISING AND GOVERNANCE UPDATES

GIFT ACCEPTANCE ISSUES FOR NHS CHARITIES

Charities are obliged to accept donations unless they have a very strong reason not to. This was an issue with the President's Club furore, where it was difficult for some of the charities involved to return donations, even when public opinion believed they should do so.

This can be an issue with ESG considerations in NHS fundraising. A number of NHS Trusts have chosen to declare a climate emergency, which will have implications for the types of organisations they will accept donations from. This list of exclusions moves beyond previous exemptions of tobacco and the arms industry. However, the charities associated with NHS Trusts, especially where they are independent, may not have replicated this stance in their gift acceptance policies. If Shell or BP, for example, wished to make a sizeable donation with naming rights, how would the charity and NHS Trust deal with the issue? These and other issues relating to gift acceptance can be picked up during one of our [Code of Fundraising Practice compliance reviews](#). We can also work with you to resolve the governance challenges these issues create.

ADDRESSING ESG CHALLENGES

"ESG", Environment, Social and Governance are three letters with growing significance for the corporate sector and this is starting to be seen across the statutory and nonprofit sectors too. Consumers and employees are increasingly expecting that companies consider purpose as well as profit. These same individuals may be donors of charities and will start to apply the same views to their giving. The Social Value Act already imposes ESG principles into how statutory commissioners contract with providers, so NHS Trusts will already be thinking about ESG matters. Charities also need to worry about their greenhouse gas emissions, including scope 3 emissions that are created through third parties as a result of business activities, such as donors driving to a fundraising event, rather than using public transport or cycling.

[Moore Kingston Smith](#) has produced its own Sustainability Report and provides assessment services for other organisations to produce their own reports and have them accredited. We can also provide advice about how to improve your ESG rating, staying ahead of the competition, while also doing more to improve people, place and planet.

INVESTMENT GUIDANCE AND CC14

The Charity Commission has been reviewing the way it encourages charities to invest in a responsible way. How charities weigh up the need for financial return versus investing ethically and reducing carbon emissions is tricky and charities have been awaiting updated guidance from the Charity Commission (following its CC14 consultation and feedback in late 2021 and then a delay to its proposed updates) alongside ESG concepts developing in the NonProfit sector.

In the absence of anything forthcoming, the High Court ruling with the Ashden Trust and The Mark Leonard Trust has confirmed that climate change can be prioritised even if it risks the financial return.

In the *Butler-Sloss & Others v Charity Commission* (2022) case, the judgement handed down provided clarity in relation to the extent to which charity trustees can permit their objects and wider moral considerations to influence their investment policy. As a result, charities can exclude investments that conflict with their objects – proving the decision is entered into in a proper manner. However, the judge advised against making decisions purely on moral grounds.

Trustees of charities have, in most instances, always tried to review their investment decisions in conjunction with their charitable aims and continue to manage the balancing act with the need to produce investment returns.

Whilst most charities will await the revised guidance from the Charity Commission (and we expect the consultation feedback exercise to restart shortly), Trustees must remember that they are required to act in the best interests of the charity and they should formulate an appropriate investment policy which should deal with direct and indirect conflicts within their investment portfolio.

PROPERTY

Sustainability is on the agenda and charities should be reviewing their estates and planning for steps that will make properties more sustainable, so that your Energy Performance Certificate (EPC) ratings are as good as they can be. Below par EPCs will restrict what you can do with your property and advice should be sought on how to improve EPC ratings – especially if your property is listed.

The Building Safety Act has brought in some new and strengthened safety measures in response to the Grenfell Tower fire. There are new rules on carbon monoxide alarms in relation to tenancies.

The Moore Kingston Smith Property team can provide further assistance in these areas if you require.

NEXT STEPS FOR THE CHARITY GOVERNANCE CODE (CGC)

The Charity Governance Code (CGC) is a practical tool to help charities and their trustees develop high standards of governance and we, at Moore Kingston Smith, have worked with a number of NHS charities in order to use this Code as a framework for a full external governance review of the organisation.

The CGC steering group has had a new Chair since the middle of 2022, Radjoka Miljevic. She has recently

shared her first blog, where she reflected on the future of the Code. In the blog, she talks about the importance of frameworks, and the value of hearing from a wide range of voices.

Radojka also looks at the future of the Code, which will be reviewed in 2023. She shares her thoughts on key governance challenges, including:

- digital and cyber concerns
- our wider environment
- our engagement with nature and the climate
- social changes from power dynamics to wellbeing.

It would be an excellent governance development if we could see, as a sector, more NHS charities using the CGC as a live review document and referring to their work (and any changes as a result of the reviews completed) in their annual trustees report as part of their financial statements.

DOES YOUR NHS CHARITY HAVE A BULLYING AND HARASSMENT POLICY?

The Charity Commission published new guidance for Charities on 11 August 2022, clarifying the roles and responsibilities of charity trustees in relation to tackling bullying and harassment within charities.

The Commission's guidelines included a specific recommendation that charities have welfare, discipline and whistleblowing policies for staff, including clear policies and procedures on bullying and harassment.

Bullying and harassment in the workplace can affect staff morale, allow unacceptable behaviours to take place and ultimately expose charities to the risk of employment tribunal claims.

Specific claims risks to charities for not taking appropriate action to eliminate bullying and harassment include:

- Employees resigning and claiming constructive unfair dismissal on the basis of the bullying and harassment and any failure by the charity to deal with it appropriately.
- Discrimination claims if the bullying and harassment is on account of any characteristic

that is protected by the Equality Act 2010 e.g., race, gender, disability, religious and philosophical beliefs.

- Civil claims for personal injury (stress at work) and/or under the Protection from the Harassment Act 1997

There is a risk that any failure by charities to implement the Charity Commission's guidance could in itself be relied upon by employees to bolster any claims they may bring.

Charities should ensure that they have the recommended policies and procedures in place and provide regular training to staff about their obligations under these policies. This will help eliminate bullying, demonstrate commitment to doing so and also reduce any risk of claims and regulatory issues.

The policy should, at a minimum, set out the types of behaviour that could be bullying and harassment, clearly explaining the process for making allegations of such behaviour, the process that the company will follow upon receipt of such allegations and the potential consequences for workplace bullies.

What other policies should charities have in place?

There are other key policies and procedures that charities can implement to demonstrate their commitment to treating employees fairly and tackling bullying and harassment.

For example:

- A welfare policy
- A grievance policy
- A raising concerns policy relating to specific types of complaints that have a wider public interest
- A disciplinary policy
- An equality, diversity and inclusion policy

These policies, if well drafted, give both parties valuable information about their rights and responsibilities and give a charity a useful action plan for how to handle any issues that might arise and any timescales that they need to comply with. In addition, having these policies in place and ensuring that staff receive training on them may give the charity a defence to a claim that they are liable for the acts or omissions of an employee who 'goes rogue' and bullies or discriminates against an employee against company instructions.

These do not have to be standalone policies - they can be included in a Staff Handbook. It is recommended that you do not make them contractual to eliminate the risk of employees claiming that technical breaches of the policies e.g., a missed deadline for responding to a letter, is a breach of contract.

We recommend that charities audit their policies and procedures to ensure that all of the required and helpful policies are in place and updated regularly to

to comply with the most relevant legal developments. Should you require any assistance with reviewing, drafting, or updating your policies to help you eliminate bullying and harassment and reduce your claims risk, please contact Moore Kingston Smith.

EMPLOYMENT LAW UPDATES

2022/23 was an important year for employment law.

Many of the employment provisions which were suspended because of the COVID-19 pandemic returned to the agenda.

Many of the new working practices that were introduced, initially in response to the pandemic, have become part of ordinary business practice, such as working from home and hybrid working, offering employees greater flexibility and creating fresh opportunities and challenges for employers. The War for Talent is likely to intensify if the current trend of mass resignations and staff shortages in some sectors continues.

The UK waits to see what changes may occur now that the UK has left the EU and case law developments will continue apace.

HOLIDAY PAY FOR PART-YEAR WORKERS

In a landmark case, the UK's Supreme Court ruled that instead of pro-rating holiday entitlement and pay using a multiplier of 12.07%, employers must give part-year workers on permanent contracts the full 5.6 weeks of paid annual leave per year regardless of the number of weeks they have worked in the leave year and must calculate holiday pay for workers on irregular hours using an average of their ordinary remuneration over a 52-week reference period. This ruling largely affects schools, but all employers who use part-year workers on permanent contracts will also see increased liabilities and potential claims risks.

EMPLOYMENT BILL 2022

The government intends to introduce an Employment Bill which will implement many of the unimplemented recommendations of the Good Work Plan, including:

- A change to the break in service required to break continuous service from more than one clear week to a month. Continuous service is crucial for accruing some employment rights e.g., the right to claim unfair dismissal and redundancy pay;
- A new, single labour market enforcement agency to protect vulnerable workers and support business compliance;
- Legislation to require employers to pass on all tips and gratuities to workers and to ensure that these

were distributed on a fair and transparent basis, supported by a statutory Code of Practice;

- A new right for workers to request a more predictable contract after 26 weeks' service;
- An extension to the period of redundancy protection for pregnant workers from the point when an employee notifies their employer of their pregnancy until 6 months after the end of their maternity leave;
- New rights to neonatal leave and pay and a week's leave for unpaid carers;
- Making flexible working the default position unless an employer has a good reason not to allow it.

The Bill did not make it to the Queen's Speech as had been expected and there is currently no predicted date for when the Employment Bill will be introduced.

UK'S WITHDRAWAL FROM THE EUROPEAN UNION

The Retained EU Law (Revocation and Reform) Bill 2022-2023 was introduced into the House of Commons. It aims to change the expected approach of reviewing and amending retained EU law slowly via legislation or case law deviating from EU rulings, allowing the UK to enact laws that best fit the country and its economy and setting a date of 31 December 2023 for the special legal status of EU law to come to an end. This date is subject to extension until 2026.

If passed, many EU retained laws could be in scope for change. It is not known what EU retained laws government may seek to revoke or change after this 'sunset date' but there are thousands of EU retained laws potentially in scope and, if the aim is to grow the economy and make it more business friendly, the TUPE Regulations, the Working Time Regulations and the Agency Workers Regulations would appear to be possible candidates. We will keep you updated as developments occur.

MENOPAUSE DISCRIMINATION

The government has said that it does not plan to make menopause a specific protected characteristic because their view is that it is already covered by sex, age and disability discrimination. However, a July 2022 report by the House of Commons Women and Equalities Committee has recommended that it become a protected characteristic, so we will watch out for any further developments in this area. Employers may however wish to consider drawing up menopause policies if they do not already have one.

IR35 REFORMS CANCELLED

IR35 is a tool used by HMRC to ensure that individuals do not disguise employment / work as contracting in order to avoid tax. The government had planned to reverse controversial reforms, which would have led to less contractors being caught by the regime, but this was reversed following the market reaction to the government's October 2022 mini budget.

DIVERSITY AND INCLUSION

Efforts to improve diversity and inclusion are very much on the corporate agenda and are expected to remain so in 2023. The government had consulted about whether to make ethnicity pay gap reporting compulsory in the same way as gender pay gap reporting is for companies with over 250 employees, but it was decided that this would remain voluntary, at least for the time being. The government plans to issue guidance for employers about this and therefore employers may wish to await this guidance before publishing ethnicity pay gap reports.

In the case of *Forstater versus CGD Europe*, the Supreme Court decided that an employer discriminated against an employee by not renewing her fixed term contract because she had expressed her belief that individuals cannot change their biological sex. However, in the case of *Makareth versus DWP*, it was decided that there was no discrimination where an employee was dismissed for expressing similar views because he had indicated that he did not intend to use peoples' preferred pronouns, thus showing that he had an intention to discriminate.

Balancing the legal rights between employees' freedom to express opinions that may be offensive with diversity and inclusion is an extremely difficult exercise and we expect cases like this to be a growth area in employment disputes in the coming years.

EMPLOYMENT TRIBUNAL CLAIMS

Tribunal statistics have not been published for some time because the data is being migrated onto a new system. However, it is being reported that the tribunals are experiencing large backlogs of cases, so it does appear that claims are rising and we would expect that trend to continue in 2023.

STATUTORY CODE TO REGULATE FIRE AND REHIRE PRACTICE

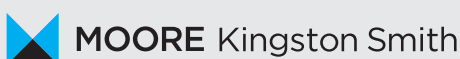
The government plans to publish a new statutory code on 'firing and rehiring'. This is where an employee dismisses staff with a view to offering them re-engagement on less generous terms and conditions. Whilst there is nothing unlawful about this, the government is concerned that unscrupulous employers may not be complying with the legal requirement to consult with affected staff before taking such extreme measures. There is no implementation date for this yet, but once implemented, employment tribunals will have a discretion to uplift any compensation by 25% in the event of a successful claim.

CONTACT US

Contact us for a no-obligation chat to see how we can secure the best outcome for you.

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