

MacRoberts Loves Charities

Winter 2018



MACROBERTS

CHARITIES



In this issue:

Welcome: MacRoberts Loves Charities	1
Scotland: A global leader in social enterprise?	2
Some welcome tax announcements in the Budget	2
The Code of Fundraising Practice is changing	3
Pensions Briefing	4
Sleepovers and the national minimum wage	5

Welcome

We are delighted to bring you the Winter 2018 edition of our Charities & Third Sector Newsletter, outlining some of the key headline-hitting stories for the third sector over recent months, together with important developments you should be aware of.

We are also pleased to provide details of our annual charities briefing which will take place in Glasgow on 7 February 2019.

Save the Date:

MacRoberts Loves Charities
Thursday 7 February 2019, 9.30am – 12.30pm

Cybersecurity: a new frontier

How do data breaches and cybersecurity interact with fundraising, donor/fundraiser and service user care and new technologies?

Governance Q&A with OSCR

Looking at topical issues for OSCR and what their views are on these – presented in a Q&A format with audience engagement.

Beyond the Workforce

What do we need to know about employees, volunteers, workers and consultants?

I do hope you can join us for this event, which promises to be a very interesting and insightful morning. Please keep an eye on [our website](#) for details of how to register.

I hope you find this edition interesting, and we would be delighted to welcome any comments or feedback you may have.

From all at MacRoberts, we would like to thank you for your support over the past year, and we look forward to continuing to work with you in 2019.

With very best wishes for the festive period,

Val Surgenor

Head of Charities & Third Sector at MacRoberts LLP

Key Contacts:



Val Surgenor
Head of Charities & Third Sector
valerie.surgenor@macroberts.com
0141 303 1100



Robin Fallas
Partner
robin.fallas@macroberts.com
0131 229 5046



Scotland: A global leader in social enterprise?

A brief review of the Social Enterprise World Forum, Edinburgh, 12-14 September 2018

Sixteen hundred delegates from across the globe were at the Social Enterprise World Forum (SEWF) in Edinburgh in September, including representatives from: Australia, New Zealand, South Korea, India, USA, Canada, Ethiopia, to name but a few. Those delegates were impressed by the impetus in Scotland for social enterprise, not only from the third sector, but also the support from government and the engagement of business generally.

Much was covered, from new and emerging global social enterprise purchasing platforms to sharing of country specific experiences and frameworks for promoting social enterprise. A number of events operated alongside the main forum, with a highly successful rural social enterprise symposium focusing on the consistently higher proportion of social enterprise found in rural communities, a zero waste and zero carbon symposium, an academic symposium and young talent event.



Robin Fallas is a Partner in our Projects team, specialising in advising on public and third sector matters, and a member of The Law Society of Scotland's Charity Law Sub-Committee.

Contact: robin.fallas@macroberts.com

From a legal perspective, discussions and presentations ranged from sharing experiences of maximising the prospects for community bodies, charities and social enterprises participating in public contracts, to increasing connections and links between legal experts with knowledge of funding and finance arrangements specific to the needs of the third sector, to presentations on existing and evolving models within the social enterprise spectrum.

SEWF highlighted and cemented Scotland's position as a leading innovator and thinker in social enterprise and MacRoberts remains proud of its longstanding support of SEWF and the sector as a whole.

For those that missed out, next year's SEWF is in Addis Ababa. We hope to see some of you there!?

Recommended reading:

- [Scotland can lead the way on social enterprise](#)
- [Where do charities sit within social enterprises?](#)
- [Social enterprise – what's happening between out-and-out charity and out-and-out profit?](#)
- [The distinction between ethical businesses and social enterprise](#)
- [Scottish Government social enterprise strategy](#)
- [Scottish Government internationalisation of social enterprise strategy](#)

Some welcome tax announcements in the Budget

The Chancellor has announced that, with effect from April 2019, charities will be able to earn more money from non-primary purpose trading before paying tax.

Where a charity carries on a trade in fulfilment of its primary purpose charitable objective, so long as the monies earned from that charitable trade are applied in fulfilment of the charity's charitable objectives, then the charity will not pay tax on that income.

Where, however, a charity generates funds from non-primary purpose trading activities, such as selling Christmas cards, those funds are taxable receipts unless the amounts earned are below certain amounts. These limits are generally referred to as the "small trading tax exemption". The current limit and the increased limits are as follows:

Current Limits		Limits from April 2019	
Annual Charitable Income	Maximum non-primary purpose income	Annual Charitable Income	Maximum non-primary purpose income
Under £20,000	£5,000	Under £32,000	£5,000
£20,000 to £200,000	25% of annual turnover	£32,000 to £320,000	25% of income
Over £200,000	£50,000	Over £320,000	£80,000

Some welcome tax announcements in the Budget (contd.)

This change should mean that charities falling within the new increased non-charitable income levels will remain outside the charge to tax and will not have to consider implement a trading subsidiary structure purely for tax based reasons.

The Chancellor also confirmed that a previously announced increase in the level of donation which may be made under the Gift Aid Small Donations Scheme (GASDS) from £20 to £30 will go ahead as soon as Parliamentary time is available to make the necessary amendment to the statutory instrument. It is anticipated that this should happen in time to allow the change to take effect from April 2019.

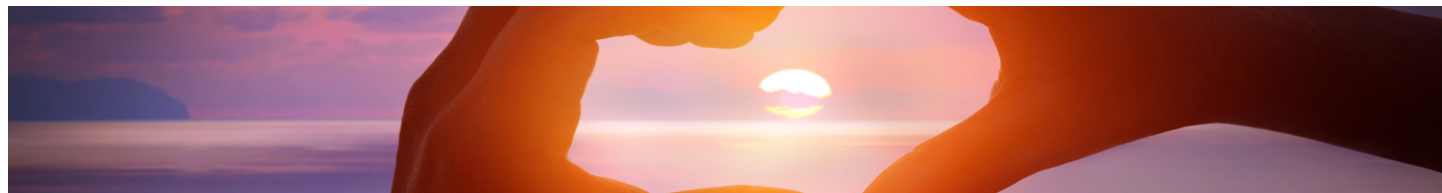
In addition to the above, the changes to the donor benefit rules which apply to gift aid, and which have been consulted on over the last few years will also come into effect in April 2019. These new rules will be of relevance to benefits provided by donors making a donation over £1,000 where the value of the benefit from April 2019 will be able to be up to 5% of the donation, with a maximum benefit cap of £2,500.

Any change which simplifies the complex tax rules which apply to charities is obviously very welcome.



Ainsley MacLaren is a Partner in our Tax team and provides advice on charity trading issues and tax issues arising on the mergers of charities.

Contact: ainsley.maclaren@macroberts.com



The Code of Fundraising Practice is changing – why should you care?

Back in September, the Fundraising Regulator took the decision to consult on the new Code of Fundraising Practice, despite the Regulator having consulted on it just last year; and whilst the consultation is now closed whether you are a big cross-border charity or a local community organisation, the revised Code of Fundraising Practice is likely to affect your organisation.

The Code of Fundraising Practice outlines the standards expected of all charitable fundraising organisations across the UK. The Fundraising Regulator holds the code and applies it when adjudicating on charities registered in England and Wales, as well as cross-border organisations. It is also used by the Scottish Fundraising Standards Panel to adjudicate on complaints regarding charities registered in Scotland. Both the Fundraising Regulator and the Scottish Fundraising Standards Panel hold charity trustees to account when investigating fundraising complaints using the code. This is why it is not just practising fundraisers who should be familiar with the code, but also volunteers, leadership teams and of course, trustee boards.

So, what are the changes?

The current consultation is focused on improving the accessibility of the code, with changes to style, presentation and language – not just content. The aim of the proposed changes is to clarify the purpose of the code, ensure the language is clear and consistent, and to simplify which parts of the code are applicable in different legal jurisdictions.

The proposed changes include incorporating the rulebooks into the main code (so no flipping back and forth), a new introduction and table of contents, a glossary (at last!), and a plain English review of the language. There will also be a new website to accompany the new code and additional guidance.



Val Surgenor is a Partner in our IP, Technology & Commercial team. She advises extensively on GDPR/data security and other compliance governance matters.

Contact: valerie.surgenor@macroberts.com

How will this make a difference to fundraisers in Scotland?

The new code will be more streamlined and easier to navigate, which will make it easier to use day-to-day and make it more accessible to everyone. This should also make its incorporation into induction training for all fundraising staff and volunteers, as well senior leadership and trustees more straight forward.

It will also make adjudication of complaints in Scotland simpler as the Scottish Fundraising Standards Panel will be able to signpost the code in its individual responses and public decisions.

One area of concern however remains the difficulty in picking out or easily identifying those particular aspects of the Code of Fundraising Practice which are of concern only to Scottish charities (or to those who work across border and need to quickly identify differences). Hopefully this will be addressed by the Fundraising Regulator following his considerations of the responses to the Consultation.

Keep an eye out for the new code, which is expected to be published in March 2019.

Local Government Pension Scheme pension debt: New Scottish Regulations in force

James Keith, Legal Director in our Pensions Group, has been advising various charity and third sector clients on the risks and threats associated with their membership of Local Government Pension Scheme (LGPS). Here is his latest update on the reforms which are available for charities in the LGPS.

Further to [last year's briefing](#) when we commented on The Institute of Chartered Accountants of Scotland (ICAS) issuing a report to the Scottish Public Pensions Agency (SPPA) calling for reform of the current cessation debt rules in the LGPS, we are pleased to report that the Local Government Pension Scheme (Scotland) Regulations 2018 came into force on 1 June 2018.

The regulations have introduced a mechanism called a 'suspension notice' which allows an administering authority to suspend a participating employer's liability to pay a full 'cessation debt', which would otherwise have become due. If an authority serves such a notice, the employer must continue to contribute towards the liabilities in respect of its current and former employees until a new and satisfactory valuation is carried out and the suspension notice is withdrawn.

This has potential to avoid the 'cliff face' scenario faced by many charities and third sector organisations on either losing a contract or having their last active member leave their employment.

The power to decide whether to issue a suspension notice lies with the administering authority, and requires that an employer enters into a formal agreement with the authority.

This doesn't solve all the LGPS issues facing charities and third sector organisations, but should be seen as helpful steps. As such, employers participating in the LGPS – including charities and other third sector organisations – should continue to have dialogue with their administering authority prior to the triggering of any event under which an 'employer debt' may become due (for example, if the last active member leaves their employment).

The regulations are available [here](#).



Auto Enrolment: Next increase in contributions coming into force in April 2019

Auto enrolment has been with us for some time now. As charities and third sector organisations will recall, the first major test (apart from setting up compliant arrangements in the first place!) for auto-enrolment came in April this year when the "minimum contributions" increased from 2% to 5% of 'qualifying earnings', with an employer paying a minimum of 2% – meaning that workers would typically meet the remaining 3%. The second big test will come next April.

In April 2019 there will be another increase, with minimum contributions rising to 8%, of which the employer must pay a minimum of 3% and the worker would typically pay 5% (unless the employer chooses to pay some or all of the worker's share).

It is important that charities and third sector organisations budget for this increase. If there are service contracts in place, is there a "change of law" or a "price adjustment mechanism" in place which reflect the uplift in staffing costs?

Hopefully the workforce will also be aware that their contributions will also increase next year. Charities and third sector organisations should engage with their auto-enrolment providers to ensure that a clear reminder is sent out in advance.

How can we help?

We are currently advising a number of third sector clients on these particular issues. Please do not hesitate to [get in touch](#) if you want to discuss your options.



James Keith is Legal Director in our Pensions Group, and a member of the Association of Pension Lawyers' Public Sector Sub-Committee.

Contact: james.keith@macroberts.com

OSCR Update

In terms of useful detail to be aware of from OSCR:

- [Changes to charity accounting requirements](#) will be in force from 1 January 2019.
- The OSCR has launched [new guidance](#) on making changes to your charity and charity names.
- Finally, the OSCR has published [new guidance](#) on charity investments.

Sleepovers and the national minimum wage – where are we now?

The National Minimum Wage (NMW) rules are often not as straightforward as they may at first appear. Employers could be forgiven (although not by the Tribunals or HMRC) for thinking that all that is required is to ensure that workers receive a minimum rate of pay for each hour worked. However, there are quite specific rules in relation to, for example, apprentices, accommodation allowances, and of course, the issue of whether sleep-in carers are entitled to the NMW.

Employers in the charity and third sector will have been closely watching this issue play out in the Tribunals and Courts. When earlier decisions held that workers were entitled to the NMW during the entirety of their sleepover shift, there was dread in the sector in relation to the prospect of covering the significant back-payments and many employers started to review their own pay arrangements.

However, the Court of Appeal decision earlier this year in *Royal Mencap Society v Tomlinson-Blake* [2018] EWCA Civ 1641 has provided some clarity and reassurance for the sector (although perhaps not if you have contractually varied the way that you pay workers for sleepovers shifts in light of the earlier decisions).

The Facts

The case concerned two care workers who were obliged under their contract to sleep at their place of work or nearby. The carers could be asleep most of the night but were required to provide assistance to the service users when needed. Both of the carers received a fixed sum for sleepover shifts (as is, or at least was, common in the sector).

For example, one of the workers had to remain at her place of work, had no specific tasks but had to essentially keep a 'listening ear'. Both claimants raised individual claims for payment of the national minimum wage for each hour they were on shift (irrespective of whether they were asleep or not).

The Ruling

The Court of Appeal has now held that, in this case, the workers were to be treated as available for work during their sleep-in shift, rather than actually working. This meant that they were only entitled to the NMW for those hours during which they were required to be awake for the purpose of working.

Impact

The decision will come as a relief to employers in the care sector, including local authorities, which is struggling under recent funding cuts, but will be a disappointment to the unions campaigning for improved pay and conditions in what is a generally low-paid sector.

A key question for employers now is whether the worker is 'available' to work or actually 'working'. The answer to that question will depend on the facts.

It is understood that Unison has applied for permission to appeal the decision to the Supreme Court. Charities who engage sleep-in workers should keep an eye on any future developments in this area and make sure they comply with their duties under national minimum wage legislation. You can sign up to our employment law updates by [clicking here](#).

Legal Updates

Legal changes can have a dramatic impact on you and your business. To ensure you have the knowledge to make quick, effective decisions, register now for our free updates. We will tell you what you need to know when you need to know it.

Sign up to receive our updates and event invitations at www.macroberts.com/sign-up

What about the HMRC Social Care Compliance Scheme?

Of course, many employers signed up to the HMRC Social Care Compliance Scheme (SCCS) following earlier decisions that workers were entitled to the NMW during the entirety of their sleepover. The Court of Appeal's decision in the Royal Mencap case seems to conflict with the SCCS. The scheme allows employers operating in the care sector to avoid financial penalties and 'naming and shaming' by signing up to demonstrate compliance with national minimum wage legislation, in what is essentially a self-review.

Nevertheless, HMRC have announced that they will continue to operate the SCCS, allowing employers to complete a self-review, taking the judgement into consideration, and make a declaration to HMRC

In September HMRC provided guidance in relation to how employers should assess NMW for sleep-in workers to comply with the Court of Appeal's decision. The guidance provided that employers should consider:

- Whether the worker is required to be available to work or is actually working;
- If the employee is expected to sleep most of the night or work; and
- What actually happens in practice.

Employers who decided to change the way they calculated and paid workers for sleep-in shifts following earlier decisions may now find themselves contractually obliged to continue to pay these higher rates during sleep-in shifts. Employers should consider the particular contractual arrangements with their staff, the potential impact on employee relations, and take specialist advice if they are considering changing the way they pay staff in respect of sleepovers.

So where are we now?

The issue of pay in the care sector will continue to rumble on. The Scottish Government previously suggested it was committed to all social care workers receiving the 'real living wage' (a rate which is higher than the NMW). It is not clear whether the Government's position will change (in respect of sleepovers at least) following the Court of Appeal's decision.

This particular decision in the Royal Mencap case will come as a relief to employers in the charity and third sector. It provides some (but not absolute) clarity. Each case is still to be determined on its own facts, and there is still a balancing act to decide which side of the line the case falls. Employers should take specialist advice.

In addition to a worker's right to enforce NMW entitlement, HMRC also has enforcement powers (including naming and shaming, financial penalties and criminal offences in some cases). It is therefore vitally important that charity and third sector employers ensure compliance and take advice.

MacRoberts' employment law team is the longest established specialist team in Scotland. In an area of law that continually evolves, our team works to ensure that our proactive advice is tailored for our clients' strategic needs. For more information, please contact Jamie Meechan or your usual employment contact.



Jamie Meechan is a Solicitor in our Employment team, advising employers and employees across a wide range of sectors in relation to all aspects of employment law and HR issues.

Contact: jamie.meechan@macroberts.com