

FARRER&Co

Trustee training: Charity law update

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26 March 2024



What we will cover



1. Sector update
2. Regulatory hotspots
3. New Charity Commission guidance
4. Legislative and cases round up

- B R E A K -

5. Charities and AI
6. Horizon scanning
7. Q&A

Charity sector in numbers

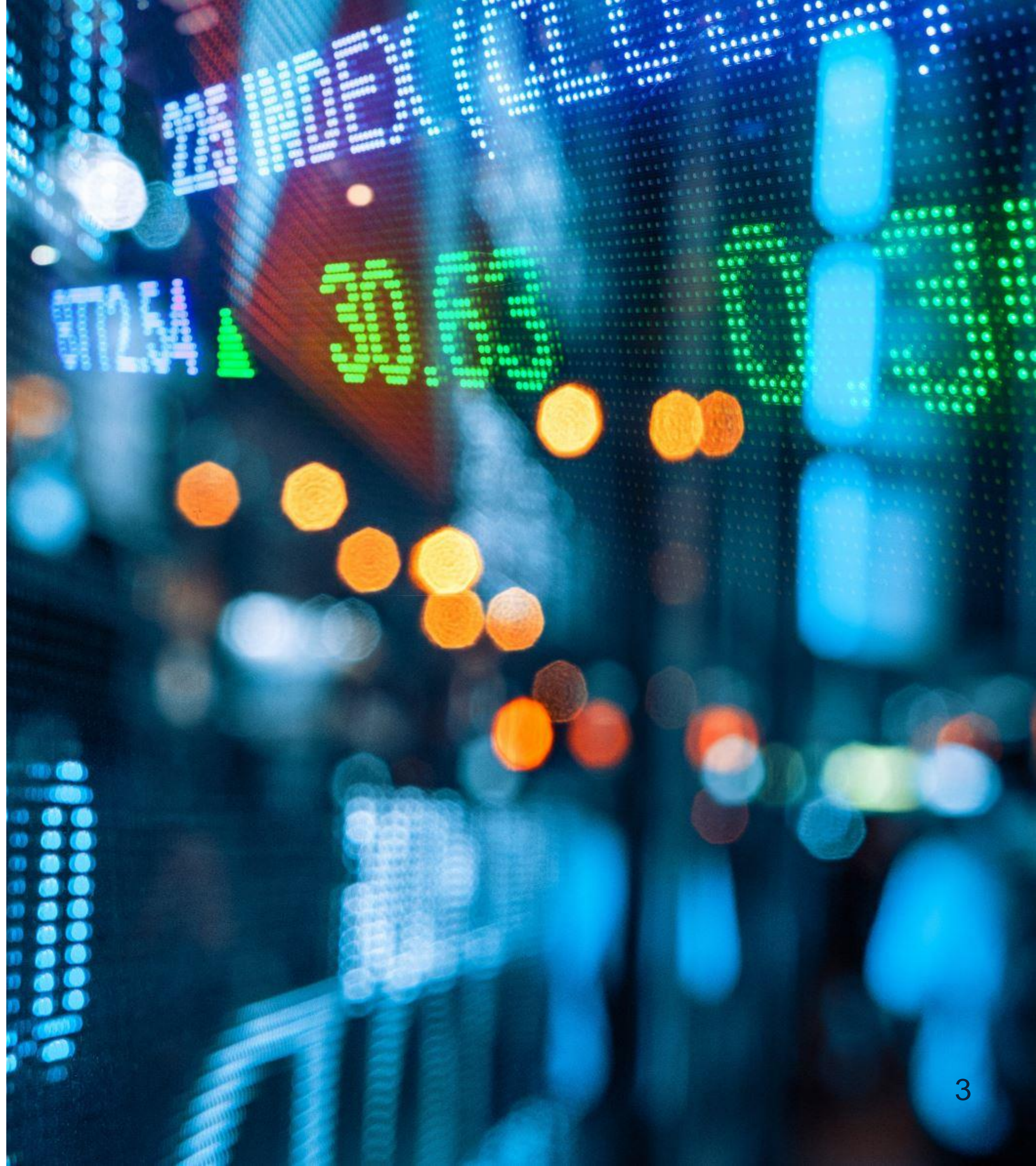
169,225 charities on the Register

- ❑ 19,333 operate outside England and Wales
- ❑ 921,924 trustees across these charities
- ❑ £89.85bn income Nearly half of registered charities - income <£10k

Charity Commission's budget - £32.35 million (511 staff)

- ❑ 8,583 applications to register as a charity
- ❑ 49 million views of the Register of Charities
- ❑ 68,497 questions answered
- ❑ 31,402 charities used the contact centre

*Facts and figures taken from Charity Commission Annual Report and Accounts 2022-23 and Commission Strategy 2024-2029



Charity Commission Strategy 2024 - 2029

Five priorities

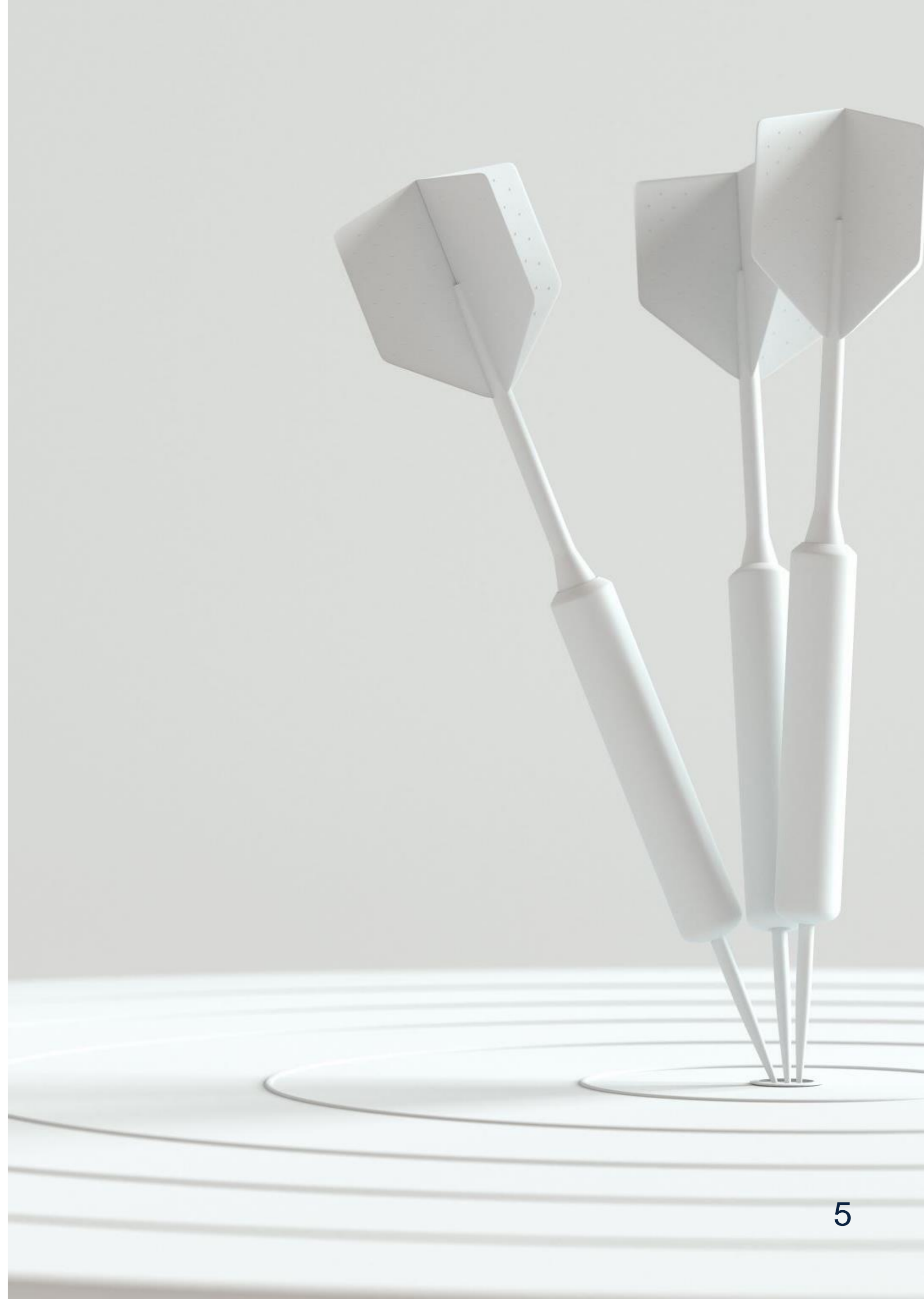
1. Fair and proportionate
2. Support charities to get it right but act robustly where it sees wrongdoing
3. Speak with authority and credibility
4. Embrace technological innovation and use of data
5. Be the expert Commission – delivering excellence in regulation

Themes in Charity Commission publications

- Shorter more accessible guidance
- Existential risk caused by cost of living crisis
- Implementing Charities Act 2022
- Increasing public trust and confidence

Current regulatory hot-spots

- Misconduct / mismanagement in a charity's administration
- Unauthorised trustee benefits
- Political activity and campaigning



Misconduct / mismanagement

Christ Church, Oxford – Official Warning

- Ongoing dispute between the former Dean and the governing body
- Litigation and PR costs reached £6.5 million
- CC issued Official Warning to governing body:
 - failing to agree a fixed budget for the costs
 - large proportion of the costs were apparently approved retrospectively
 - insufficient transparency in its accounting for these costs
- Taken together, CC determined these were failures and omissions which amounted to misconduct and/or mismanagement in the charity's administration.



Misconduct / mismanagement (continued)

CC's decision to get involved:

- [Guidance on charities and litigation](#) v [regulatory and risk framework](#)
- CC didn't open an investigation. Official Warnings as quicker approach?

Things to consider:

- If litigation looks like it may become protracted, review guidance
- Keep litigation under review and document decision-points to continue, with evidence as to why considered proportionate
- Consider at what point litigation might become reportable as a serious incident ("substantial loss")
- Budget and costs to be approved in advance
- Account transparently



Benefits to Trustees

Captain Tom Foundation - Statutory inquiry

- Concerns raised about arrangements between family and Foundation
- Spa building constructed at family home
- Issues around commercialisation
- Statutory inquiry to review questions around: unauthorised benefits, managing conflicts of interest, and failure to comply with legal duties and responsibilities

Trustee benefits should be expressly authorised

Watch for Connected persons

Easy to be caught out where family members are involved both as trustees with another member a CEO

Importance of managing conflicts of interest

Political activity and campaigning

- Responsibility of charities to campaign with “respect, tolerance and consideration”
- Avoid inflammatory rhetoric
- Legal duty?
- [Charity Commission guidance: campaigning and political activity \(CC9\)](#)
- [New social media guidance](#)



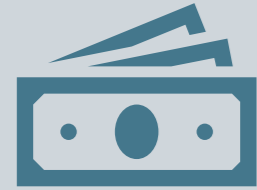
Political activity and campaigning (continued)

Things to think about

- Remind yourselves/others of CC9
- Campaigning must be in support of your charitable purpose
- Support policies rather than people or parties
- Review social media policy in light of CC guidance
- Particular considerations once election is announced
- Consider the Electoral Commission's Code of Practice for non-party campaigners



New Charity Commission guidance 2023/4



Accepting and refusing donations



Social media guidance



New CC14 – investing charity money

Accepting / refusing donations

New guidance published in March 2024

- Generally, starting point is to accept money when it is offered
- Counterweighing reasons to justify refusal need to be significant
- Charity Commission will rarely intervene when charities refuse a donation – but rarely is not never
- “Materially irrational decision-making”
- “Personal squeamishness”



Accepting / refusing donations

Donations you may need to refuse or return:

- Not within the charity's purposes
- May result in a legal claim if the charity accepts or keeps it
- Undermine independence (for example, by requiring charity to agree key decisions with donor)
- Bring unacceptable burdens to the charity
- Involve unacceptable private benefits to the donor

Accepting / refusing donations (continued)



Things to think about

- Review existing gift acceptance policies/develop one if you don't have one
- Internal v external-facing?
- Appropriate delegations and authorities. Sensitive donations to be a matter reserved to the Board?
- Evidenced decision-making – example relevant factors in new guidance
- “Reputational concerns” not enough
- Not all stakeholders are beneficiaries

Accepting / refusing donations (continued)

Returning a donation

- Legally distinct from refusing
- More difficult – limited legal grounds on which you can return
- Charity Commission approval may be required
- Contractual provisions? But Gift Aid point
- **Remember: much better to refuse than to accept and then want to try to return → importance of good acceptance policy**

Useful practical guide to developing policies:
[Chartered Institute of Fundraising](#)

Social media guidance

- Published 18 September 2023
- Background and consultation

Key takeaways:

- Social media policy
- Communications training for trustees, staff and volunteers
- Responsibility for social media channels
- Inflammatory content – how does it further your purposes?
- Engaging with the public
- Consistency with charitable purposes
- Lawful communications (more on that later)
- Staff / trustee / volunteers' personal accounts
- Procedures for dealing with breach of the policy
- Serious incident reporting



Campaigning during an election period

- Charity law remains in force (with CC9 as a guide to interpretation)
- Electoral law “gloss”:
 - Calculation of the “regulated period”
 - What counts as regulated activity – the “purpose test”
 - Registration with the Electoral Commission?
 - Spending limits for non-party campaigners
 - The Commission’s supplemental guidance [Charities, Elections and Referendums](#)
 - Transparency statements on hard copy and digital media
 - NPC statutory [code of practice](#) – laid before Parliament September 2023 and came into force 1 December

New CC14 – Butler-Sloss case

- Judgment handed down on 29 April 2022
- Helpful clarification of the Bishop of Oxford case
- Confirms extent of trustees' discretion to exclude investments that potentially conflict with the charitable purposes
- How to carry out a balancing exercise?



New CC14 – investing charity money: guidance for trustees



Updates Charity Commission’s investment guidance – new CC14 published 1 August 2023

Reflects Butler-Sloss judgment and how trustees can take account of ‘non-financial considerations’ when investing

Also updates and amends Commission’s terminology and guidance on social investment

Key point from Butler-Sloss and in CC14: record your decision and your reasons!

Legislative round-up

- **Charities Act 2022 – almost all provisions now in force**
 - ❑ New rules for changing governing documents
 - ❑ Ex-gratia rules – in force later in 2024
 - ❑ Changes to rules for property disposals the ‘designated Adviser report’
- **Economic Crime and Corporate Transparency Act**
- **Foreign Influence Registration Scheme**
- **Digital Markets Bill**

Cases - 2023

- London Borough of Merton Council v Nuffield Health
- Haque and another v Faradhi and others
- Mermaids v Charity Commission and another
- Attorney General v Zedra Fiduciary Services (UK) Ltd
- Friends of Victoria Hall v Charity Commission



Trustee training: Legal implications of using Generative AI tools

Alan Baker
26 March 2024



Generative AI: what is it?

- AI models capable of **generating** text, images, audio, video and other content
- Generated output **requires**: (1) a user's **input prompts**; and (2) **training data** embodied in the AI model
- Distinguish from traditional software, which is programmed on an 'if this, then that' basis (with pre-coded outcomes)
- Distinguish from 'discriminative' AI, which classifies things based on machine learning prompts (e.g. 'spot the malware')

Examples of popular GenAI tools:

- ChatGPT (by Open AI)



- Copilot (by Microsoft)



- DALL·E (also by Open AI)



- Gemini (by Google)



- Stable Diffusion (by Stability AI)



- Midjourney (by Midjourney, Inc.)



Generative AI jargon buster

- “Artificial neural network” / “deep learning” = a machine learning model that mimics the neurons in the human brain, so a computer can connect myriad data points (“nodes”)
- “AI apps / applications” = those AI applications which are based on foundational models
- “Foundational” models = those AI models on which other software tools are built
- “Machine learning” = teaching computers to recognise [word / text / image] patterns through data and algorithms (i.e. a series of instructions / rules followed in calculations)
- “Large language model” = a type of foundational model which has been trained on vast quantities of text (sometimes referred to as a *corpus* of data, typically petabytes in size)
 - “GPT” = Generative Pre-Trained Transformer (a type of machine learning tool)

Key points to understand about Generative AI systems:

1. Computer is 'trained' on a huge dataset (**training data**);
 2. User makes a query with user prompts (**input data**);
 3. Computer then generates content (**output data**) in response to the user's query, based on what the AI 'knows' or rather has been able to work out from the training data – *for an LLM, this means “what is the next best word / phrase?”*
- ... by comparison, think how Google Search works, but imagine the output being (a) creative / expressive, and (b) detached from / not citing the input source(s) (*although some tools e.g. Copilot now starting to do this*)
-

Potential GenAI use cases

- Automating back-office functions
- Extracting details from documents
- Beneficiary support chatbots / answering questions & ‘advising’
- Codifying and making interactive funding advice / charity policies etc. (for example Ian McLintock’s www.charityexcellence.co.uk)



UK Govt's AI White Paper

- “A pro-innovation approach to AI regulation” – seeks to promote the UK as a leader in AI innovation and regulation
- The Government wants to promote innovation while managing risks... and says no new legislation is required to achieve this (contrast the EU AI Act)
- Instead, the UK proposes a sector-based approach, where existing sector regulators will guide and enforce the development and deployment of AI based on five common principles (see over)

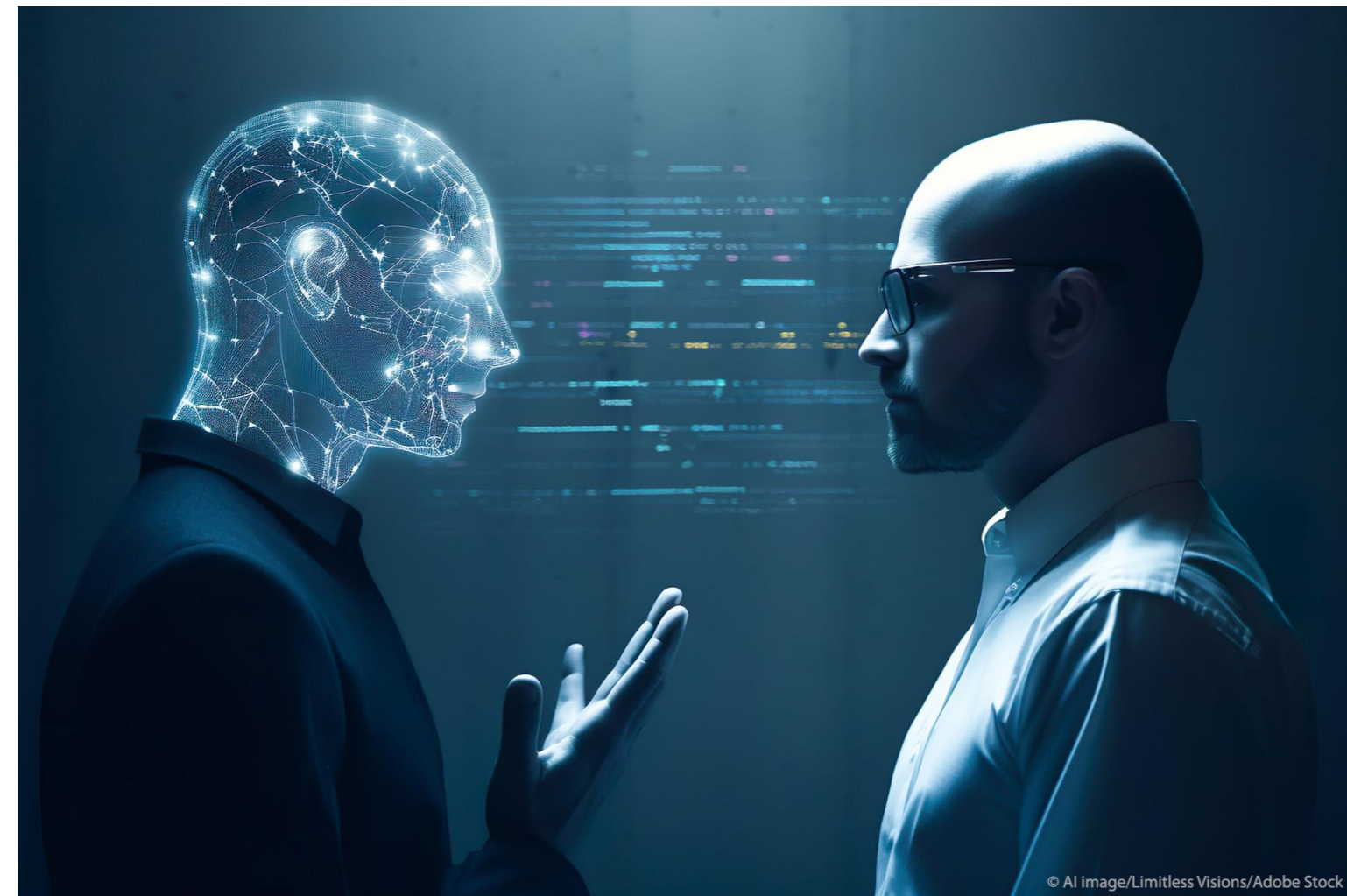


Department for
Science, Innovation,
& Technology

The EU AI Act*

* *It's a Regulation*

- Commission made a proposal for a regulation in April 2021; Council proposed amendments in Dec 2022; and Parliament text published in June 2023...
- Following 'trilogue' discussions, final text adopted by MEPs this month (March 2024)



"The world's first comprehensive AI law"

- Adopts a **cross-sector, risk-based** approach, with harmful AI uses banned, a defined list of "high risk" **AI systems** subject to strict requirements (e.g. transparency), and lower-burden or no requirements for medium / low risk AI
- Applies to: (a) **providers** of AI systems on the EU market; (b) **users** of AI systems based in the EU; and (c) providers / users of AI systems based outside the EU, where the AI generated *output* is used in the EU
- **Enforcement** by national regulators, overseen by a new "EU AI Board"
- **Fines** up to €35m or 7% of turnover

Copyright and database right

- Data scraping: AI tools are trained on copyright material, e.g. from the Internet. Have the rights holders licensed this use? Very unlikely...
- So AI developers / users need to ask: (a) does data extraction / scraping require copying?; (b) does the storage of training data / derived content involve copying?; and (c) does the AI's generated content involve a copy / adaptation [of a substantial part]?
- *Getty Images v Stability AI* – copyright infringement case brought in the US and UK, alleging that Stable Diffusion infringes copyright in millions of images owned by Getty. What about 'fair dealing' (UK) / 'fair use' (US) defences?



- *New York Times v OpenAI* – similar issues re copyright in text
- UK Government proposed TDM extension – but rowed back on this to protect creative industries
- Vallance review (March 2023) recommended clearer Gov't policy ... so the UK IPO is writing a code of practice on copyright and AI

Confidential information and trade secrets



Terms of use

- ChatGPT's terms of use gives Open AI the right to use input data to train / improve the model... although it is possible to opt out using a form
- Certain other AI tools do not retain input data
- Particular information that should generally not be shared with Gen AI tools includes: (a) trade secrets; (b) other confidential information; (c) information subject to non-disclosure duties; (d) legally privileged material; (e) personal data
- Note that ChatGPT's terms of use are made with individual users (for the free version, at least)...
- ... and Open AI gives no assurances about confidentiality / data security...
- ... while capping its liability to \$100 or 12 months' worth of fees (i.e. none?)

→ As such, AI acceptable use policies for staff, and contracts with third parties, should normally restrict the upload of confidential information to ChatGPT / other AI tools

Data protection and privacy

- ‘Data minimisation’ principle: is personal data included in the training data? Does it need to be? Is personal data included in the input data / user prompts? Does it need to be?
- Article 22 GDPR: right not to be subject to a solely automated decision that produces legal or similarly significant effects on the individual
- How to ensure ‘privacy by design’ and ‘by default’, particularly if beneficiaries / staff are vulnerable in some way (but AI can be used for good in this respect, e.g. identifying where better accessibility etc. is required)



- [ICO guidance on AI and DP](#) (updated March 2023, may need updating again for White Paper’s five principles)
- [ICO guidance with the Alan Turing Institute on explaining AI decisions](#)
- And lots of [ongoing ICO work on fairness in AI](#), including risk toolkits, etc.
- ...plus a [new consultation series on generative AI and DP](#) (2024, ongoing)

Terms of use and licensing issues

- Open AI's Terms of Use are subject to California law and jurisdiction, incorporating Service Terms (for beta features, etc.), Usage Policies (including extensive / restrictive list of non-permitted content), and a Sharing & Publication Policy, which requires that:

“The role of AI in formulating the content is clearly disclosed in a way that no reader could possibly miss, and that a typical reader would find sufficiently easy to understand”

- Consider enterprise versions of AI tools, which may have more 'generous' terms of use; and can e.g. liability caps be negotiated?

- Consider whether training data is subject to open source licences



GitHub
Copilot

- Essentially another copyright case but a key issue / allegation is that open source licence terms are being ignored by AI developers
- The key point: please do read the small print, and do some due diligence before integrating AI tools with critical services, etc.

Practical tips for charities using Generative AI tools

1. Engage the Trustees / leadership team: explain the opportunities and threats
2. Establish / participate AI oversight committee: to consider AI use cases and give them approval / reject high risk uses
3. Draft / review AI acceptable use policies: giving examples of low risk (acceptable) and high risk (unacceptable) use cases
4. Interrogate AI developers' terms of use and attribution policies, etc. [*and build in to your internal AI acceptable use policy*]

Use GDPR compliance experience to:

- Carry out AI impact assessments
- Develop AI transparency information – and to explain how it works
- Maintain records of AI use (e.g. who within the organisation is using it, which AI systems are they using, under what contract terms, etc.?)
- Negotiate contracts with AI providers?

F&Co's Generative AI 'rule book': ideas for AI Use Policy?

1. Delay using GenAI until you understand the technology and its potential impacts
2. Don't share anything with GenAI tools you wouldn't disclose to the whole world
3. Prohibit third parties from sharing your material with GenAI tools 'on your behalf'
4. Be sceptical about what GenAI generates
5. Don't rely solely on GenAI to make important decisions about individuals, or about your charity / your organisation
6. Be aware of the risks of retaining or using GenAI output data
7. Don't think that GenAI output data is legally privileged (or insurable)
8. Be transparent about the use of AI, and label material produced by GenAI tools
9. Keep an audit trail so you can 'clean the room' of GenAI output data, if you have to
10. Monitor carefully the development of GenAI laws and regulatory guidance

Horizon scanning

- ❑ **Charities Act 2022** – Ex gratia rules in force later in 2024
- ❑ **Charity Commission guidance** – will be simplified and shorter in future
- ❑ **Fundraising Regulator** – changes to the levy and Code of Fundraising Practice
- ❑ **Charities Governance Code and Charity Investment Governance Principles**
- ❑ **A change of Government?**



Fundraising update

- Consultation on major changes to the Code of Fundraising Practice
- The Fundraising Levy
- Fundraising Regulator – casework points to flag particularly around sub-contracting



Q&A and how to find out more

- Any questions?
- Sign up to our charities mailings to receive updates:
<https://www.farrer.co.uk/subscribe/>
- Please do get in touch with any specific questions or training needs. We would be happy to help.



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