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## Introduction

Welcome to the MacRoberts Third Sector newsletter. “Disruption” seems to be the word of the moment and we see plenty of evidence of this in the Third Sector.

I attended a recent SCDI event to discuss Innovation, and as I listened to Oracle Corporation’s Director for Scotland, Caroline Stuart, it became clear that “Disruption” can mean many things to many people; however my main takeaway from this discussion was that “Digital Disruption” was (and is) a force for good presenting so many opportunities not only for the main stream commercial sector but also the highly innovative Third Sector.

As the Third Sector continues to adopt and embrace (.... and for some embark upon) the digital age we are seeing the impact digital technology can have and is having on society and how we can deliver services and deliver them in a more interactive and personalised manner, and giving us, the delivery vehicles of those services, an opportunity to rethink the way we work.

As we move off the cusp and fall head first into this Fourth Industrial Revolution “We don’t want technology simply because it’s

dazzling. We want it, create it and support it because it improves people’s lives” [Canadian Prime Minister Justin Trudeau Davos 2016]. And whilst we get to grips with what is “Digital Disruption” and the “Internet of Things”, we see the output of governments and regulators as they re-examine and create new guidance and rules around technology to support and protect users and developers of technology alike.

In this Spring newsletter we see evidence of this, whether it be with forthcoming changes to data protection rules and what we can and cannot do with the information we gather, guidance to trustees on incident reporting for when matters go wrong or when can you (and when can you not) “snoop” on employees emails. Plenty to think about yet the opportunities to transform and accomplish amazing things are boundless.

I hope that you find our Spring Newsletter useful and should you have suggestions for future topics then please get in touch.

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## Buy Social Corporate Challenge

Last month the Cabinet Office, in partnership with Social Enterprise UK, introduced the “Buy Social Corporate Challenge” which aims to connect businesses with social enterprises.

As part of the challenge high profile businesses have promised to spend £1 billion with UK social enterprises by 2020 (through purchase of their goods and services).

To date seven businesses have signed up to the challenge including PwC, Zurich and Santander.

The Cabinet Office have promoted this initiative as an exciting opportunity for social enterprises to showcase their ability to deliver comparable or better services at fair costs to corporate clients. At the same time making a difference to communities across the UK.

Our experienced commercial contracts team can assist any social enterprises contracting with business for the provisions of goods or services.

## OSCR'S New Guidance



### Trustee Guidance

Scotland's charity regulator issued new guidance on the 4 April 2016 for charity trustees which sets out their duties and responsibilities ([the guidance is available here](#)).

Guidance and good practice for charity trustees has been substantially rewritten (although the law and principles remain the same) following consultations the regulator conducted with charities and third sector advisers. The new guidance intends to reflect the experiences of Scottish charities and creates a user-friendly model for trustees. The guidance sets out both specific and general duties of charity trustees noting where legal duties apply and providing examples of good practice for charities to undertake. Links to sources of help and advice have also been included. The guidance is split into six sections: charity trustee duties; governing documents and meetings; conflict of interest; charity finances; remuneration; and publicising.

Understanding the responsibilities of being a trustee is important to you and the charity, whether you are a new or experienced trustee. Review of your legal duties is of itself good practice and we would encourage all trustees to view the

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## Insolvency

Unfortunately there have been a number of charity closures throughout the UK in recent months caused by financial difficulty.

The Charity Commission for England and Wales recently issued [guidance for charities facing financial difficulty on how to reduce the risk of insolvency](#).

This guidance recommends that trustees review the charity's financial performance against budget and future projects on a regular basis and at least quarterly. Additionally, the guidance clarifies the

[new guidance](#) and what elements make up [good governance](#) in any charity.

### Serious Incident Reporting

OSCR recently published guidance recommending that charity trustees notify OSCR of serious incidents or events as soon as they occur.

This approach is intended to help prevent problems for charities, by involving OSCR at an earlier stage, and minimise potential damage. Notification is recommended in regard to fraud, substantial financial loss, governance issues and criminal investigations. This guidance is only a recommendation, as there is no legal obligation to notify OSCR, however an organisation's conduct could be called into question if it decides not to inform OSCR and the situation progressively worsens.

It may not be appropriate to notify OSCR in all circumstances and specific legal advice should be sought when facing a serious incident. Like any operational organisation it is important for charities to have in place "disaster recovery plans" and procedures for dealing with serious incidents which should incorporate obtaining legal or regulatory advice where appropriate. MacRoberts' Corporate Defence team deal with prosecutions brought by a range of regulatory bodies (including financial, criminal and health and safety investigations) and is on hand to assist from the initial contact with investigators and throughout any legal hearings.

duties of trustees in relation to protecting charity assets, what it means if the use of assets is restricted, when a charity may be facing insolvency and when Trustees may become personally liable for any debts. MacRoberts' specialist Corporate Recovery Partner Alan Meek regularly advises organisations seeking advice and assistance in insolvency and near-insolvency situations.

There are a number of resources available to charities aimed at business recovery, one such source for enterprise

## ICO - New Direct Marketing Guidance



The ICO have published new guidance on direct marketing. The guidance aims to help organisations comply with data protection and privacy laws when undertaking fundraising or promotional activities and identifies the actions the ICO can take if organisations fail to abide by the legal rules. The guidance has a specific section relating to not-for-profit organisations which includes examples and explanations of marketing practice.

In light of recent fundraising scandals it is vital, from a reputational perspective as well as a legal one, that organisations comply with direct marketing rules which the updated guidance seeks to clarify.

In particular, not-for-profit organisations need to ensure they are entitled by law, or have adequate consent from individuals to contact them about fundraising or promotional matters and should be especially careful when they communicate through text or email as the 'soft opt-in' exception only applies to commercial marketing. In order to send marketing by these methods express consent must be obtained.

focused charities is the Just Enterprise programme designed for Scotland's third sector. [Just Enterprise](#) encourages organisations to connect with them early on to address problems at a time when there are more options.

## Fundraising Review



September 2015 heralded the review of fundraising regulation in England and Wales (by the NCVO (Etherington Report)), and in Scotland (by the SCVO).

The key reforms south of the border are now well underway, and those charities with fundraising activity in England and Wales should be alert to the changes. Reform in Scotland is moving at a slower pace with uncertainty as to which approach will be taken (perhaps because Scottish charities have not experienced the drop in trust and confidence reported elsewhere in the UK).

Following our report on the progress of the review of fundraising in the [last issue of this newsletter](#) the progress outlined below has been made.

### England and Wales:

The FPS working party published a [discussion paper](#) on the Fundraising Preference Service (FPS) setting out the key characteristics of the service and the service is expected to be in place by April 2017. The Charities (Protection and Social Investment) Act 2016 received royal assent in March; however most of the provisions do not take effect immediately and will be implemented over time (an implementation plan has not yet been published). This Act imposes more controls and safeguards around fundraising; introduces a new

statutory power for charities to make social investments; provides for the disqualification of charity trustees; and creates increased powers for the Charity Commission to step in as a regulatory body should the revised system of self-regulation of fundraising in the industry fail to secure the results sought.

The IoF and the PFRA have signed heads of terms for their merger agreement with completion planned for 31 July 2016. The new Fundraising Regulator is on track to be fully operational by early summer and recently launched its website with logo and branding.

Some charities have expressed reservations about paying the levy to cover the set up costs of the new Fundraising Regulator (e.g. Parkinson's UK and RNIB) and most recently the Tate art gallery announced its refusal to pay. The levy is voluntary, but the 2016 Act does provide the government with the ability to impose mandatory payment if charity compliance becomes an issue. It will be interesting to see how this develops as we near the launch of the Fundraising Regulator.

### Scotland:

The Scottish Fundraising Working Group (set up by the SCVO) has issued an options appraisal outlining three potential approaches to self-regulation

of fundraising by the third sector in Scotland, including:

- **Option 1:** a UK wide Fundraising Regulator to act as intermediary – this option would bring Scotland in line with the English approach outlined above so that the new Fundraising Regulator would also oversee the fundraising of Scottish charities;
- **Option 2:** a new Scottish Fundraising Regulator to act as intermediary – this option would create a Scottish Fundraising Regulator with a similar role to the Fundraising Regulator in England and Wales but specifically responsible for supervising Scottish Charities;
- **Option 3:** no intermediary – this option allows charities to take ownership via self-regulation while providing the OSCR with an enhanced role.

The working party advocated Option 3 as most aligned with the initial SCVO recommendation that the regulatory approach taken in England and Wales was inappropriate for Scotland where fundraising 'scandals' have been less of issue. Implementation of Option 1 would require adoption of the FPS whereas the working party leave it to public decision whether Options 2 and 3 integrate the FPS.

For further information we will shortly release a detailed insight on these regulatory changes and how they will affect you in both England and Wales and in Scotland.

[If you wish to receive our blog updates please click here.](#)

## Data Protection



The European General Data Protection Regulation (GDPR), the most extensive overhaul of data protection regulation in over 20 years, is now in final form after a four-year process.

Data protection compliance is important for third sector organisations as most will obtain and process personal data for everyday operation. The GDPR significantly enhances the responsibilities of both data controllers and processors and non-compliance will lead to hefty fines. Accordingly, it is vital that all organisations (and particularly trustees) are aware of the GDPR reforms and approach the issue proactively. The three significant changes for the third sector include:

- **Consent**

The threshold for valid consent will increase removing the option for opt-out consent and data controllers must keep

proof of consent they have obtained. Data subjects will also have the right to withdraw consent at any time.

- **Data Protection Officer**

Those organisations with “core activities” that consist of (1) processing operations which require regular and systematic monitoring of data, or (2) processing of sensitive data at a large-scale, will be required to designate a Data Protection Officer (DPO). The DPO will notify the organisation of their data protection obligations, monitor compliance with obligations and will act as a point of contact for the supervisory authority. A DPO can be a current staff member with data protection expertise or a third party expert.

- **Pseudonymisation**

The GDPR encourages use of pseudonymisation (a technique of processing personal data so that it can no longer be attributed to a specific person without the use of additional information which must be kept separately) when appropriate for the protection of personal information after consideration of any risk involved.

For most organisations complying

with the GDPR will involve a change of practice, procedure and culture in those organisations. There is a two-year grace period for compliance with the GDPR (which will become law on 25 May 2018).

Third sector organisations must begin planning now to ensure they are GDPR ready for spring 2018. In particular, organisations should take advantage of what is essentially a two-year trial period for any DPO appointed now. [The ICO recently issued guidance on the steps organisations can take to prepare.](#)

MacRoberts' team of data protection specialists can provide expertise and advice to organisations wishing to adopt this proactive approach to compliance preparation.

MacRoberts' shall shortly publish a dedicated GDPR section on its website, including a series of blogs. [If you wish to receive these updates please click here.](#)



## Suite Of New Procurement Legislation

New procurement legislation came into force on 18th April, implementing new European procurement rules and also bringing in a national (Scottish) regime. Some key points for the third sector include:

- An expanded scope to reserve contracts to ‘Supported Businesses’. The definition has changed and widened FROM organisations with aims to support employment of disabled persons whose workforce comprises 50%+ disabled TO organisations with aims to support employment of disabled or disadvantaged persons whose workforce comprises 30%+ disabled or disadvantaged. If you are in that widened territory and provide services/supplies,

keep an eye on developments.

- From 1st June, public bodies are to consider how their procurements can involve communities, the third sector and SMEs. Those with significant spend will, from December 2016, need to publish procurement strategies. It will be important for certain charities and social enterprises to understand such strategies and the new focus on ‘sustainable procurement’.

- All public sector service/supply contracts over 50,000 are to be advertised on Public Contracts Scotland (there are exceptions) so whether a charity or a social enterprise interested in ensuring no opportunities are missed,

ensure you are signed up.

- There are a number of important changes relevant to procurements of social, health and care contracts. Sources of further detail at this stage include [statutory guidance](#) and renewed [non-statutory guidance](#).

MacRoberts have recently run breakfast seminars to brief clients on the changes to procurement law in Scotland.

Please contact us to discuss how the changes impact you or if your organisation is interested in training.

## Pensions



**James Keith, a Senior Associate in our Pensions Group has been advising various charity and third sector clients on the risks and threats associated with their pension schemes and new obligations under auto-enrolment.**

In the last quarter he spoke at the SCVO Gathering at the SECC, our own Charities Briefing and has just submitted the below blog on “Pensions and Charities: Plan and Budget Now for Auto-Enrolment” to Third Force News - so it is hot off the press!

### **Pensions and Charities: Plan and Budget Now for Auto-Enrolment**

Auto-enrolment affects all charities with employees or workers.

If your charity has more than 30 employees, you've probably already reached your 'Staging Date', are providing a workplace pension for your employees and are required to make minimum contributions. If so, have you budgeted for the future and managed risk?

Not reached your Staging Date yet? If your charity has a PAYE reference number in issue before April 2012, your last possible Staging Date is April 2017 – but it could be much sooner. If [The Pensions Regulator](#) has not sent your Staging Date to you, [enter your PAYE reference](#) here to check it as a matter of urgency.

**If you have your Staging Date, budget as soon as possible!**

Charities should prepare and plan as quickly as possible - budgets are tight, grant funding applications have to be submitted, existing contracts may have to be reviewed and pay rises may

need to be taken into account. The Regulator's '[understanding your costs](#)' [guide](#) is a good starting point. Helpfully, the Chancellor announced a delay in the increase in the minimum employer contribution rate to 3% of 'qualifying earnings' until April 2019.

If, for example, the charity is undertaking work which is outsourced from a Local Authority or other public body, have you stress-tested your budget to take into account the future increases in minimum auto-enrolment contributions? Is there a 'change in law' provision which can help?

### **Managing Risk**

You may be a small charity with a couple of employees in a defined benefit (DB) scheme, such as The Pensions Trust or the LGPS. On a daily basis I advise many charities of the risks associated with these schemes. The common theme is that charities, if they can avoid it, do not want their liabilities to increase.

Ordinarily charities would look to auto-enrol any existing employees into a 'defined contribution' or 'money purchase scheme' which has less risk attached to it, rather than inadvertently enrolling their employees into the DB scheme.

Alternatively, if you operate a fairly generous group personal pension plan with a surprisingly low membership rate, stress test the scenario of every employee being enrolled, based on their current contractual entitlement: could your charity afford this? If the answer is no, the charity will need to factor in enough time to be able to legally consult with affected employees so they would be auto-enrolled at a lesser or 'default' contribution rate of 1%, 2% and 3% of qualifying earnings (as phased in).

Don't assume that you will continue to have a high opt-out rate from your workforce. The DWP's auto-enrolment valuation report in 2015 confirmed that the overall employee opt-out rate was 10%, which means that 90% have stayed in their pension scheme once enrolled.

### **Fines for non-compliance**

While compliance has been pretty good to date, with the Regulator imposing relatively few fines and compliance notices, the Regulator's enforcement activity is increasing. In its own words, "We expect to see a rise in the number of times we need to use our powers so our message to employers remains clear: start getting your plans in place early or you risk being fined".

### **Choosing a scheme**

Helpfully, the Regulator's website now includes [information to help employers find a pension provider](#) including a list of 'master trust' pension schemes open to employers and charities of all sizes.

### **Planning!**

Get advice and work on a project plan: pension consultants, financial advisers, accountants, payroll providers and even lawyers can help you.

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## Employment



The recent European Court of Human Rights (ECHR) case of **Barbulescu v Romania** received lots of media attention when it found an employer justified in monitoring his employees' private e-mails.

Despite the contrary opinion, this judgement does not permit employers to snoop through their employees' e-mails, and charities should be cautious of doing so without the appropriate framework in place.

The ECHR confirmed that employees had a reasonable expectation of privacy at work but that this right is not absolute.

It is important to note that the monitoring in this case was limited in scope and was not a phishing expedition, in particular the court noted that (1) the employer had a clear policy regarding the private use of the employer's computer system, (2) monitoring was the only effective way of ensuring that the computer systems were being used for professional tasks during working hours, and (3) the employer had only examined the Yahoo Messenger account and had not looked at other data on the computer.

Organisations must be mindful that they do not have free reign to read their employees e-mails and if they intend to monitor this communication this should be carefully and suitably governed by a policy.

MacRoberts' team of employment specialists can assist and advise organisations on the framework and practice required to monitor employee communications appropriately; as well as advising on wider employment law and hr related work issues.

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## About MacRoberts

We are one of Scotland's leading commercial law firms.

We maintain strong links within the Scottish economy, working with large private and public companies, small and medium-sized enterprises, entrepreneurs and owner-managed businesses, banks and financial services institutions, public sector bodies, charities and all levels of government.

We have vast experience and an impressive track record in areas including all aspects of corporate law, taxation, pensions and share schemes, employment law, construction, transport and major infrastructure projects, real estate and energy. We also provide a selected service to private individuals. This means you can be confident that we will be able to understand your issues, anticipate any problems and ensure the best possible outcome for you.

You will find us professional, approachable and, most of all, straight-talking.



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