

# Autumn Charities & Third Sector Newsletter

MACROBERTS

LLP

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## Introduction

Welcome to the Autumn 2017 edition of our Charities & Third Sector Newsletter.

At MacRoberts, preparations are under way for our 2018 Annual Charities & Third Sector Briefing. Further details will be announced soon, so please keep an eye out for these – this is always a really interesting event with a panel of fantastic speakers, and the 2018 event is one not to be missed!

It has been a busy few months for our team. Val Surgenor recently attended the Institute of Fundraising Conference in Glasgow on 3 & 4 October, and took part in the panel entitled “*Are fundraisers the Cinderella of Scottish Charities?*”. Val was also a member of the judging panel for this year’s Society Awards, hosted by The Sunday Herald and Social Work Scotland. MacRoberts are delighted to support the Young People’s Project of the Year award at this year’s awards, which take place in Glasgow on 1 November. This year’s CEIS Conference also took place in Glasgow in September, where Robin Fallas moderated the session on “*Social procurement – international and local dimensions*”, during which delegates discussed initiatives with public bodies, social enterprise supports and commercial sector engagement.

Partner Duncan Osler travelled to New Zealand in September to attend and speak at the 2017 Social Enterprise World Forum (SEWF) in Christchurch. MacRoberts are delighted to be a sponsor of the 2018 SEWF which will take place in Edinburgh from 12-14 September, attracting over 1,200 social enterprise delegates to Scotland’s capital. Duncan Osler said, “Having advised CEIS for a number of years, we are delighted to be on board as a sponsor for an event that celebrates and promotes creating a better Scotland through decreasing inequality, tackling poverty head on and energising communities. Any international event in Scotland that promotes and encourages this gets my vote.”

Gerry Higgins, CEO of CEIS, said, “We could not be happier to have MacRoberts on board as a sponsor for the SEWF 2018. We have enjoyed a great relationship with the firm for a long time and they have supported a number of our initiatives over the years. The SEWF 2018 will be a fantastic opportunity to not only cement this relationship but strengthen it too.”

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## Mental Health in the Workplace

To quote the CIPD: “Mental health issues have a significant impact on employee wellbeing and are a major cause of long-term absence from work. Employers are encouraged to promote good mental health and provide support for those employees who are experiencing mental ill health such as anxiety or depression.”

It is not surprising that mental health issues (including stress, depression, anxiety and other serious conditions) are one of the most common reasons for sickness absence from the workplace, resulting in 15.8 million days lost (11.5% of total days lost) in the UK in 2016 (Office of National Statistics).

Despite these figures, only around 17% of employers recognise that that percentage is likely to apply to their staff. It is no surprise that highlighting mental health and wellbeing in the workplace has been the focus of recent campaigns and discussions.

So what can or should employers do to support employees who are suffering from mental health challenges? Employers should start by focusing on two main aspects: pre-employment and those issues arising during employment.

The law provides discrimination protection to employees with mental health conditions if they qualify as being disabled under the Equality Act 2010. Employers also have a duty to take reasonable care for the health and safety of their employees. The Equality Act protects employees who have a qualifying disability from:

- less favourable treatment because of that condition compared to treatment of those who don't have such a condition (**direct discrimination**)
- less favourable treatment **arising in consequence** of the condition which can't be objectively justified
- **indirect discrimination** where, without justification, a provision criterion or practice puts or would put someone who shares that condition with others at a disadvantage compared to others who don't have the condition, when the person with the condition is disadvantaged
- **harassment and victimisation**
- there is also a duty on an employer to **make reasonable adjustments** to avoid any substantial disadvantage that a disabled person may find themselves subjected to because of a provision, criterion or practice; or physical feature compared to a non-disabled person.

Lawful “positive action” allows employers to take steps to address the position if disabled people suffer a disadvantage, have particular needs or are disproportionately under represented, without the risk of a claim for discrimination by non-disabled people.

Typically many employers use psychometric testing, language tests or questionnaires to initially reduce the number of candidates they receive for a particular role. However, pre-employment issues can create scope for discrimination claims against employers.

The Equality Act prevents employers from asking wide-ranging health questions before offering a candidate work or placing the candidate in a pool of available candidates. That means that employers can ask certain limited questions at an early pre-offer stage and only when they are necessary, for example for: establishing whether the applicant will be able to undergo an assessment or whether the employer needs to make reasonable adjustments in respect of such an assessment; establishing whether the applicant will be able to carry out a function which is intrinsic to the work concerned; monitoring diversity; supporting positive action or establishing if the applicant has a disability, where such disability is a requirement for the job in question.

It is worth remembering that compensation for unlawful discrimination is potentially uncapped, and can include compensation for injury to feelings and personal injury.

In *Government Legal Services v Brookes* (EAT/0302/16), a candidate who suffered from Asperger's syndrome successfully brought claims in the employment tribunal for disability discrimination after the first stage of a recruitment process which involved a multiple-choice based on situational judgment. GLS had indirectly discriminated against Ms Brookes. It had failed to make reasonable adjustments and had treated her unfavourably because of something arising in consequence of her disability. The Tribunal ordered GLS to pay compensation to Ms Brookes and made a recommendation that the Respondent issue a written apology to her and review its procedures for people with a disability applying for employment, with a view to greater flexibility in the psychometric testing regime.

Employers may be expected to allow extra time or adjust their chosen method of testing in cases where a disabled applicant asserts that the method of testing puts them at a disadvantage.

### During employment

What should employers do when an employee becomes mentally unwell at work? They should intervene early. They should have policies and processes in place to ensure early identification and diagnosis; and offer means of support. This can encourage constructive and professional relationships to allow employees to feel comfortable discussing issues they may have, and to successfully maintain operations in work.

Policies are important, but the employer's obligations do not stop there. Employers must consider the steps they take and whether they are appropriate depending on the particular circumstances of the case.

Employers should ensure that they understand the employee's condition or impairment as far as possible, and as early as possible. This includes obtaining medical evidence from their general practitioner, or in difficult cases inform a specialist about the condition. In some cases, carrying out a risk assessment would be appropriate.

Giving employees access to confidential counselling, and training staff about mental health and on the employer's relevant policies will help to support affected employees.

Many employers are introducing training in mental health first aid which includes a process to assess risk, engage in a conversation with the employee and listen non-judgmentally. The first aiders aim to provide reassurance and information and encourage professional help and informal support.

The Scottish Government has stated in its Mental Health Strategy 2017-27 that its ambition is to prevent and treat mental health problems with the same commitment, passion and drive as it does with physical health problems. The UK Government's review by Lord Stevenson as to how to transform how mental health is regarded in the workplace is awaited. Employers must think about mental health in the workplace with a view to supporting their employees at all stages in their careers.

Our specialist employment lawyers can provide help and advice on the best practices and solutions available to employers.



**Katy Wedderburn** is Partner and Head of our Employment team. She advises on all aspects of employment law, from dismissal, discrimination and pay to terms and conditions of employment.

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## Scottish Fundraising Panel Update

It's been said that the highest praise a Scot can give is "I've no complaints". On that basis, charity fundraising in Scotland is in great shape!

Last year the [Scottish Fundraising Standards Panel](#) was set up to assist the charitable sector in Scotland to regulate itself as regards fundraising. We are charged with overseeing fundraising standards, and we can adjudicate complaints that a charity cannot resolve itself. We're a small but experienced voluntary group of seven plus a chair, supported by one paid member of staff. So this is light touch regulation.

The reason for not going down the route of appointing a large Fundraising Regulator as they have in England was the belief that Scotland's needs are different in this area. For a start, we have very few large charities based in Scotland that are in a position to outsource their fundraising, which is where a lot of the trouble can happen. Conversely, there are lots of small charities who don't immediately fit in with the assumptions behind the Code of Fundraising Practice, to which they are, nonetheless, accountable. And people in Scotland seemed to be more content with fundraising practices than they were in England.

Luckily, that last point seems to be borne out by the fact that the Panel hasn't yet had a formal complaint to investigate. We know of some disquiet, but it's not on the scale they have down south, where the Regulator has around four complaints a month that merit investigation. When a complaint does come to us, we will take it seriously and work with other regulators to ensure that the public can be comfortable about making donations and that charities can be confident that their practice meets high standards.



Alison Elliot is Chair of the Scottish Fundraising Standards Panel, and was Convenor of the SCVO from 2007 to 2013.



## Local Government Pension Scheme pension debt: Future reform for charities?

*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 and hope that there will be reforms for charities in the LGPS.*

The Institute of Chartered Accountants of Scotland (ICAS) has issued a report to the Scottish Public Pensions Agency (SPPA) calling for reform of the current cessation debt rules in the LGPS.

### What is cessation debt?

Currently, charities must keep at least one employee within the LGPS to avoid automatically triggering a cessation debt. This debt can be a significant amount of money for charities and ICAS's report estimated that charities who were at risk of triggering in 2014 (so, over three years ago) had debts of between £10m and £15m.

So far, so good. But we mustn't be complacent. We should remember that it was a big scandal about fundraising that prompted OSCR to be set up in the first place. People don't suddenly don haloes when they cross the Border. Perhaps people don't know that they should get in touch with us. But they complain plenty to OSCR about other things, but not about fundraising.

So, let's concentrate on keeping standards high. The fundraising landscape is well supplied with organisations that can give advice and guidance. The Institute of Fundraising promotes excellent fundraising by its members and its new Scottish Standards Board is looking at how to tailor advice for smaller charities. SCVO is committed to ensuring that the sector is above reproach because the reputational damage of poor behaviour quickly spreads across the board. And OSCR is currently consulting on draft Fundraising Guidance, so take time to let them know what you think.

There's no point in us replicating this activity, even if we could, and we recognise that we're part of a network of agencies trying to help charities navigate the culture change that is being demanded of them. That change is considerable and charity trustees have a lot of detailed demands on their plates these days.

When the detail becomes overwhelming, it's worth stepping back and thinking about the big picture. Charities are a key part of the social fabric and have an impact on all our lives. Some of us encounter a charity as a beneficiary, others as a contributor, whether we give our time as a volunteer, our skill as a member of staff, or our money as a donor. Lubricating the whole process are the funds our fundraisers secure. Rather than pitting donors against fundraisers, if we respect the part each other plays, we can strengthen the whole system, to everyone's benefit.

### Pension debt – a catch 22 for charities?

Cessation debt often exceeds the costs of staying in the LGPS, and so, charities are often forced to remain in the LGPS. This means that charities can build up pension liabilities which they cannot afford.

Charities also risk unintentionally triggering a cessation debt e.g. when their last employee in the scheme retires. ICAS warned this could create a sudden unplanned debt for charities putting them at risk of collapse.

If local authority staff are transferred to a charity under TUPE, the charity is usually required to offer them a broadly comparable pension arrangement. Accordingly, when staff already in the LGPS are transferred over to a charity, the charity has been compelled to take on responsibilities for historic liabilities.

## Local Government Pension Scheme pension debt: Future reform for charities? (contd.)

### What did ICAS propose?

At the moment, the LGPS (Scotland) Regulations 2014 (the “LGPS Regulations”) fail to recognise the disproportionate impact of the cessation debt issue on charities. Indeed there are differing approaches within the various LGPS funds in Scotland. It comments that members of the public donate to help charitable causes and not to public service pensions. ICAS advocates that the Scottish Government has the power to stop charities building up unaffordable pension liabilities in LGPS through amending the LGPS Regulations.

In its report, ICAS made the following key proposals for reform:

1. The LGPS Regulations should be amended to prevent the automatic trigger of a cessation debt.
2. LGPS funds should provide greater flexibility in the payment terms offered when cessation debts are triggered.
3. Cessation debts should be calculated on a more realistic basis, making them more affordable to charities.
4. In terms inherited liabilities, ICAS stated that there should be a consistent approach to liabilities and has advocated the approach which Lothian Pension Fund has taken whereby the local authority would generally retain its proportionate share of liabilities on any transfer to a charity.

### How can we help?

We are currently advising a number of third sector clients on this particular issue. Please do not hesitate to get in touch if you want to discuss your options.

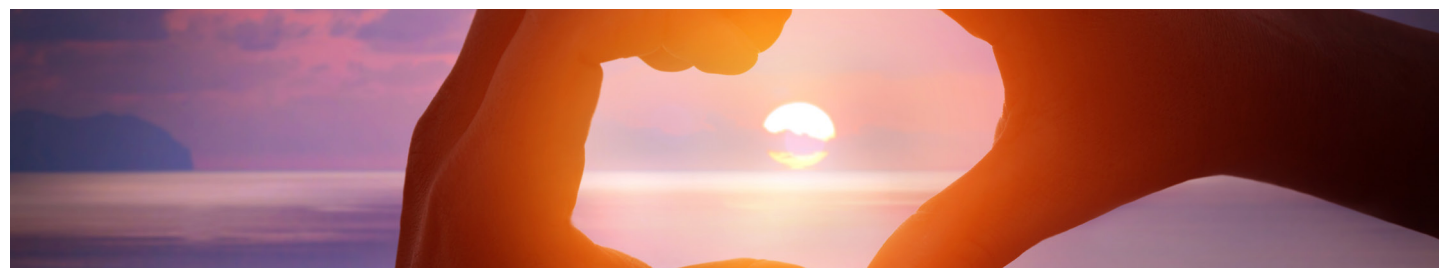


**James Keith** is Legal Director in our Pensions Group, and a member of the Association of Pension Lawyers’ Public Sector Sub-Committee.

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We are currently planning our 2018 Annual Charities Briefing! Keep an eye out for details becoming available very soon!

Keep up-to-date with the latest legal developments in the sector – sign up to our free online updates at [www.macroberts.com/sign-up](http://www.macroberts.com/sign-up)



## An update on Kids Company (and good governance)

In the late summer it was reported that Business Secretary Greg Clark had announced plans to bring proceedings against nine former directors of the collapsed charity Kids Company to have them banned from company directorships.

Former chief executive, and high profile face of the charity, Camila Batmanghelidjh was not formally a director at the time of the collapse but the proceedings will allege that she was acting as a de facto director. Batmanghelidjh and the other former directors could face bans from directorship of between 2 and a half and 6 years.

Kids Company was established in 1996 to provide support to deprived and vulnerable inner-city children and young people and had grown to employ more than 600 people. The charity collapsed in 2015. A report by the Public Administration and Constitution Affairs Committee, published last year, stated that trustees’ “negligent financial management” had rendered the charity unable to survive when sexual abuse allegations caused several donors to withdraw their support from the charity. A police investigation later found no evidence to support these allegations.

The National Audit Office reported that the charity had received at least £46 million of public money despite repeated concerns about how it was run. Prior to the collapse, two finance directors at the charity left in a period of less than three years because of their frustrations that the charity would not accept warnings that it needed to build up reserves in order to ensure its financial sustainability. The accounts show that despite receiving vast amounts of government

funding the charity spent almost all of the money it received each year. Batmanghelidjh has stated that Kids Company recognised that it needed to have reserves, but said its “unpredictable income and overwhelming demand from vulnerable children and families” left the charity with “complex choices”.

The collapse of Kids Company and subsequent proceedings against the former directors provides a stark reminder to charities of the importance of a good reserves policy to ensure financial resilience in unforeseen circumstances. It is likely that Kids Company could have survived these unfounded allegations had the charity ensured it had a reasonable level of reserves in place in relation to its size and the amount of funding received each year.

Charity trustees / Directors of charitable companies in Scotland will find [OSCR’s updated \(2016\) Guidance on Trustees’ Duties](#) sets out useful good governance measures, implementation of which ought to avoid issues similar to those at Kids Company arising.



**Robin Fallas** is a Senior Associate 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.

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## The GDPR: Myth or Truth?

The GDPR and a new e-Privacy Regulation are due to come into effect on **25 May 2018**. These two regulations will change the way the third sector operates on many levels, including its internal business operations (e.g. HR; IT; finance) but also its external fundraising activities.

Over the past few months we have been asked a number of questions on a fairly regular basis and we can sense both a level of “GDPR fatigue” but also that a number of organisations are simply confused and frustrated by the abundance of guidance that sometimes doesn’t all say the same thing. So we thought perhaps this might help?

**Familiar Question No 1: I work in [Fundraising] [Comms] [Marketing] [please replace with your appropriate job title]. When can I use legitimate interests and when do I use consent?**

Let’s start with a true lawyerly answer: “it depends”... arghh.....!!!

The ability to use legitimate interests for the processing of personal data is already included in the current Data Protection Act 1998; however, the GDPR now includes an explicit mention that the processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest in recital 47 (recitals being some text that sets out the reasons for the provisions in the legislation in plain and more helpful language (mostly!!)). However, recital 47 has perhaps misled many organisations into thinking that that they will not have to ask people for consent to send electronic marketing materials.

When electronic marketing is envisaged (e.g. email; phone call; text) it’s not only GDPR that matters; the PECR/e-Privacy Regulation need to be considered too. So let’s have a quick easy checklist: these are some rules for **[Fundraising] [Comms] [Marketing] [please replace with your appropriate job title]**:

- **Live calls:** consent or legitimate interests but **only** if the data subject is not registered on TPS.
- **Automated calls:** consent.
- **E-mail:** consent or soft opt-in (soft opt-in option does not apply to fundraising).
- **Text:** consent or soft opt-in (soft opt-in option does not apply to fundraising).

What is soft-opt in? This is an exception that applies to existing customers – if an individual bought something from you recently and did not opt-out of marketing messages, they are probably happy to receive marketing from you about similar products or services even if they have not properly (or expressly) consented (e.g. opted-in). However, to rely on this you must give existing customers a clear opportunity to opt-out (when you first collect their details and in every

communication thereafter). However, soft opt-in does not apply to prospective customers (or bought-in customer lists) and it does not apply to charity fundraising.

Postal mail doesn’t come under PECR/e-Privacy Regulation (because it’s not electronic!) so you can rely on legitimate interests for this method of marketing but, remember that use of legitimate interests is a balancing test. The legitimacy of your interests must be balanced against the effect on the rights and freedoms of the individual.

**Familiar Question No 2: What about my corporate contacts and B2B e-mail marketing – can I contact my corporate donors without consent?**

Currently under PECR:

- Sole traders and some partnerships are treated as individuals – so you can only email them if they have specifically consented.
- The rules on consent and the right to opt out do not apply to corporate donors (e.g. company, Scottish partnership, limited liability partnership or government body). However, the ICO recommends that it is good practice to keep a suppression list of any businesses that object or opt out.
- Employees can have personal corporate email addresses (e.g. john.smith@macroberts.com), and individual employees do have the right to opt out.

Changes under the new e-Privacy Regulation:

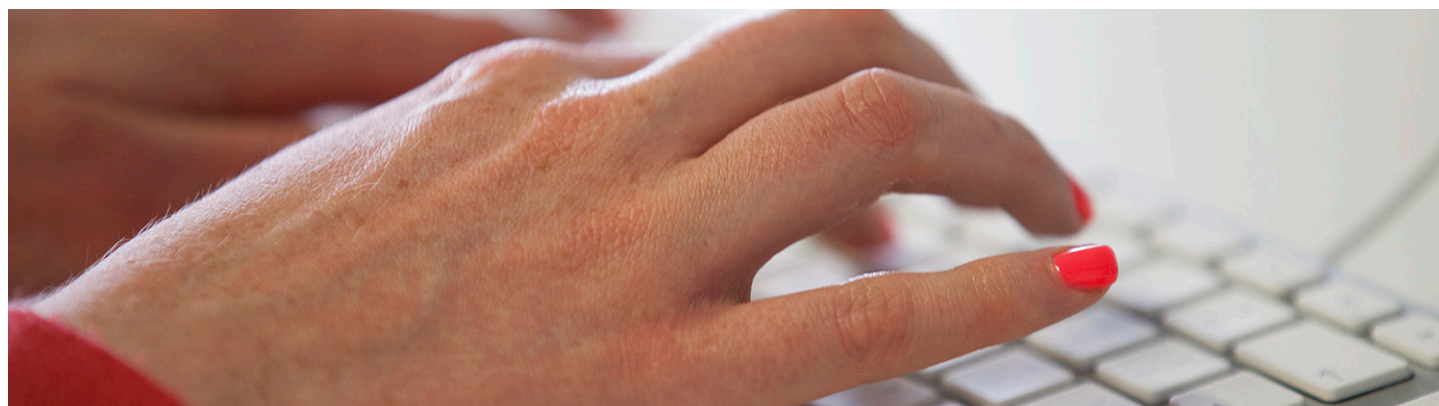
At the moment we only have a draft of the e-Privacy Regulation and therefore what it says may change in the coming months. So, we can only comment on what it says right now i.e.: “Natural or legal persons may use electronic communications services for the purposes of sending direct marketing communications to end-users who are natural persons that have given their consent.”

This means that you will need consent to contact natural persons. But what are ‘natural persons’? Are natural persons consumers; or can a natural person be an employee of a business?

The Article 29 Working Party (who represent the various EU data protection authorities) have clarified that, in their view, this means that direct marketing sent to ‘natural persons working for legal persons’ requires prior consent.

So, to contact John Smith at his work email address (e.g. john.smith@macroberts.com) you would need his prior opt-in consent; but consent is not required when contacting generic email addresses (e.g. info@macroberts.com).

But this all assumes that the draft of the e-Privacy Regulations is finalised in its current form.



## The GDPR: Myth or Truth? (contd.)

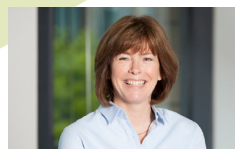
**Familiar Question No 3: How often do consents need to be “refreshed”?**

Your obligations do not disappear once you have obtained valid consent (remember your organisation has to comply with the “Accountability” principle) – it is not a one-off compliance tick box; and you must keep your consents under review and refresh them if anything changes.

The GDPR does not expressly state that you need to refresh consents; and it does not set a specific time limit for consent. However, the ICO draft guidance on consent provides that consent is likely to degrade over time and how long it lasts will depend (another good lawyerly answer!) on the context.

However, consideration should be given to:

- the scope of the original consent request; and
- the individual’s expectations.



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

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The ICO recommends that you consider whether to refresh consent automatically at appropriate intervals; and advises that two years is a good period to aim for but it may need to be done more regularly depending on the circumstances. We would say, it’s all about context and what would be an individual’s expectation – your organisation needs to think about it and not necessarily set a two-year period that may be inappropriate in the circumstances – it may be that a shorter period of time is required or a longer period of time. Think first about the data collected, what you told the individual at the time of collection, the context and what would have been the expectations of the individual when they gave your organisation permission to look after their data!

MacRoberts’ team of data protection specialists can provide expertise and advice to organisations wishing to adopt a proactive approach to compliance preparation. Find out more [here](#).



**Melissa Hendrie** is a Solicitor in our IP, Technology & Commercial team, advising clients on compliance and intellectual property matters, and the GDPR.

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## Fundraising Guidance: OSCR wants to hear from you!

OSCR has recently issued draft fundraising guidance, which is in two parts:

- first part: self-regulation and the duties of the charities trustees; and
- second part: requirements of the 2009 regulations which applies to all benevolent fundraising.

### Why is the guidance important?

There has been a number of changes in the self-regulation of fundraising over the last two years and some negative attention from both the public and the media (mainly in relation to English charities as opposed to Scottish ones) so the introduction of the fundraising guidance will help you to understand the standards you have to achieve and the requirements you must follow in order to maintain public support and trust.

### The consultation is now open!

As part of the process for drafting the fundraising guidance, OSCR is consulting on the guidance. So your views and opinions are important and will help to ensure that the guidance is clear and easy to understand. The consultation is open for 12 weeks from 7 September 2017 to 1 December 2017 and is a fantastic opportunity to have your voice heard.

If you wish to participate in the consultation, the response has been split into two parts:

- **Usability questionnaire:** this will only take a few minutes to complete and consists of a series of questions which ask you to rate the draft guidance in terms of how easy it is to navigate, if you found it helpful and how easy it is to understand. The questionnaire is completed online and can be found [here](#); and
- **Content questions and response form:** this asks more in-depth questions about the draft guidance and provides you with an opportunity to comment on any of the matters covered by the fundraising guidance and on any relevant matters where questions have not been asked. This form can be accessed [here](#).

Responses can be e-mailed to [info@oscr.org.uk](mailto:info@oscr.org.uk) or they can be printed out and posted to the following address:

OSCR, 2nd floor, Quadrant House, Riverside Drive, Dundee, DD1 4NY.

Click [here](#) for more information.



**Val Surgenor** is a Partner in our IP, Technology & Commercial team. She was Chair of the Scottish Fundraising Implementation Group and is now one of the Independent Panel’s members.

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*This article was written with assistance from Sam Brand, Legal Student.*

## Digital Leadership

Digital leadership is emerging as a fundamental skill for the modern charity, with the third sector featuring heavily in the finalists for the Digital Leader awards in June this year. The awards recognise individuals and organisations who are leading the way in digital transformation – a topic discussed in our [Spring 2017 Newsletter](#). View the list of the Digital Leader 100 Award Winners [here](#).

### But what is “digital leadership”?

David McNeill, Director of Digital at the SCVO, defines digital leadership as “leadership that’s fit-for-purpose in a modern world”. Digital leaders are individuals and organisations who demonstrate an innovative and sustainable approach to digital transformation. They understand the key aspects of digital and how they integrate into strategy and governance, making their organisations more visible and giving them a competitive advance in the digital age.

Digital leaders are bold and embrace change in order to stay relevant. They encourage experimentation, learn from mistakes and are not afraid of failure. Digital should be at the heart of every organisation’s strategy and cannot simply be regarded as an ‘add-on’. Effective digital leadership recognises how digital can help organisations achieve their aspirations. Zoe Amar, director of Zoe Amar Communications, [highlights](#) that “your charity may have run the same services for decades but the world in which it operates has changed radically”. For that reason, digital leadership will also now be recognised as part of the [Social CEOs awards](#) in November.

## SCVO Cyber Essentials Grants Scheme

Following a [finding](#) that a number of those in charge of cyber security within the third sector did not feel well informed about cyber security, SCVO have launched the Cyber Essentials Grants Scheme in a bid to help small to medium sized charities understand what it means to be cyber resilient – being both proactive in the prevention of cyber breaches and reactive if a breach occurs. Becoming more cyber resilient now will also help organisations prepare for the GDPR coming in to force in May 2018.

The scheme offers small-scale grants between £500 and £1,500 to help cover the application and IT support costs required to achieve the Cyber Essentials accreditation. Applications opened on 21 September 2017 and applicants must be a Scottish registered charity with either their own internal IT support staff or with a contracted IT supplier. The maximum annual income threshold to receive the Grant is £4 million and it is the responsibility of the qualifying organisation to contact and contract a supplier to carry out the accreditation.

The closing date for Round 1 of the Scheme is 20 October 2017. [Please visit this page for more information about applying.](#)



Rhea McKenzie is a Trainee Solicitor at MacRoberts and is currently placed in our IP, Technology & Commercial team.

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## About MacRoberts

MacRoberts occupies a position of leadership and prestige in the Scottish legal sector and beyond. This position has been maintained through the delivery of high-quality, innovative and practical solutions for clients, by a firm with an impressive ability to adapt to the contemporary commercial landscape.

Our lawyers are more than just lawyers, we are industry experts with unrivalled commitment to the sectors in which our clients operate. Keeping up-to-date with relevant law, industry challenges, and technological advancement is not just part of the job – it is a reflection of our enthusiasm. This dedication has allowed our firm to thrive, winning the favour of some of Scotland’s largest organisations and projects throughout the years.

Visit our website to find out more: [www.macroberts.com](http://www.macroberts.com)



## Legal Updates

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