law and charities: the 2017 update

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legal areas to be thinking about in 2017

• the constitution… and nothing to do with Brexit
• fundraising: legacy issues
• a new fundraising regime: data management
• your people: employment law matters
the rise of the SCIO… legal form selection

… and the end of the trust?

CONSTITUTIONAL FORMS OF NEW THIRD SECTOR BODIES IN SCOTLAND

Sources
Charities
www.oscr.org.uk
Community Interest Company
constitutional matters

- the new OSCR Annual Return

- “when did the charity trustees last look at and consider the content of the charity’s governing document?”

- what is your answer?
a different view of governance…

Jaffa cakes
(definitions (and their dangers))

cats and boxes
(effective oversight (and the real governance rule))
Change to meet challenge
Handling organisational change in the workplace

Fiona Morrison
Introduction

• Organisational change - the what and the why

• What’s in a name - contractual changes v redundancy

• Contractual changes – the essentials

• Redundancy – the essentials

• Hot spots
What is organisational change and why do it?

- TUPE, redundancy, contractual change, none of the above
  - the good news and the bad news

- Squeeze on finances – everywhere you look

- Employment specific costs growing -
  - national living wage, “real” living wage
  - reach of working time/national minimum wage evolving

- Historic practices/arrangements no longer a good fit
What’s in a name - contractual changes v redundancy

• My job is changing – is it a change to my contract or is my old role redundant?

• Why it matters

• What’s the difference – “the deal v the role”

• Why “redundancy” anyway – it’s not as if we’re closing down!
Contractual Changes – the essentials

• Identify the contractual term you’re changing

• Is the change already allowed?

• 3 main routes to changing contracts
  – agree
  – impose
  – dismiss/re-engage

• Some general thoughts on managing change
General thoughts on managing change

• Process is key - make sure plan is in place for making the change

• Start by considering: how many employees the change impacts, whether you have a recognised trade union (collective bargaining may be necessary) and whether a risk assessment of the change is necessary

• Engage as early as possible - give adequate warning of change

• Be prepared to do a selling exercise – convince employees as to why the change is necessary

• Genuinely consider proposals put forward by employees

• Consider discrimination (direct or indirect)
Redundancy – the essentials

• Defining our terms

• The reasonableness test

• Pooling and selection

• Consultation

• Alternative employment
Defining Our Terms

- Does the organisational change amount to a redundancy situation?
- Definition of redundancy
  - Business closure
  - Workplace closure
  - Reduced requirement for employees
    - Less work to do
    - Same amount of work can be done by fewer employees
- Wider definition for collective consultation purposes
Reasonableness

• Start with – can it be avoided?
• Selection
• Consultation
• Alternative employment
Selection

- Identifying pool
  - Unique post
  - Similar jobs
  - Agree with union?

- Selection criteria
  - Future needs of organisation
  - Tailored to individual situation
  - Objective
  - Non-discriminatory
  - Based on skills, ability, performance
Consultation

• Individual
  • Notify and explain reasons
  • Opportunity for employee to comment
  • Don’t forget during a collective consultation process!

• Collective
  • 20 or more redundancies in 90 days
  • Begin at least 45/30 days before first dismissal
  • Protective awards - up to 90 days’ pay per employee
  • Notify DBEIS (DTI in old money) - criminal penalties
Alternative employment

• Seeking to avoid dismissals

• Unreasonable refusal of suitable alternative – lose statutory redundancy payment

• Trial periods
Hot Spot Issues

- Employees on maternity leave
  - Consultation
  - Special protection

- Sickness absence/disability

- Volunteers

- Grievances
Questions?
fundraising: ‘legacy’ issues

winning and losing

• ease of giving
• legacies in wills
• restructuring risks
  • “particularity of intention”
• contentious cases and challenges: Melita Jackson
• conditions and restrictions… and unlocking them
new fundraising expectations and oversight

**a new Scottish approach**

- a new Scottish Fundraising Complaints hub hosted by SCVO
- charity is the first port of call for complaints (policy in place?)
- still unhappy?
  - Scottish or UK charity?
  - refer to the Independent Standards and Adjudications Panel for Fundraising in Scotland
    - non-statutory powers and sanctions
- “the fundraising guarantee”
- model complaint handling procedures
- interaction with rest of the UK and lead regulator principle
- interaction with general good governance etc
- data protection and information management and duties
Data protection law and charities – hot topics

Shona Tennant
Hot topics

• *Alzheimer Society* enforcement – data security breaches

• *BHF* and *RSPCA* MPNs – wealth screening, data matching and data sharing

• Data protection law reform: The General Data Protection Regulation and draft ePrivacy Regulation
Charities are in the spotlight

Case Studies

- **Alzheimer Society** – *ICO issued an enforcement notice re compliance with DPA*
  - Volunteers assisting with fundraising
  - Lack of training
  - Use of personal email addresses to receive and share information about people using the charity
  - Storing unencrypted data on their home computers and failing to keep paper records locked away

“In failing to ensure volunteers were properly supported, this charity showed a disappointing attitude towards looking after very sensitive information.” - ICO
Charities are in the spotlight

Case studies

- **RSPCA and British Heart Foundation** – *collectively fined £33k*
  - Breached the Data Protection Act 1998 in three ways:
    - **Wealth screening** – *wealth management companies to rank donors based on wealth*
    - **Data and tele-matching** – *filing in the gaps*
    - **Data sharing** – *lack of transparency and details mistakenly shared with other charities despite having opted out of receiving marketing communications from other organisations*

- A further 11 charities have been issued with a notice of intent to fine
What went wrong? The ICO’s view

- Background: the data protection principles
  - Fair and lawful processing (principle 1)
    - Use of privacy notices
    - Lawful basis and use of the legitimate interests condition
  - Purpose limitation (principle 2)
- Re-use of publicly available information
- Wealth screening
- Data matching and teleappending

- Read more: http://brodi.es/2kElq7S

“Fairness...means that personal information should only be used in a way that people would reasonably expect” – Elizabeth Denham, Information Commissioner
The General Data Protection Regulation
The GDPR – what is it?

- New EU-wide data protection law
- Replaces the Data Protection Directive/Data Protection Act
- Comes into force 25 May 2018
- Brexit
- Does not affect rules on ePrivacy, but NB draft ePrivacy Regulation
- Culture change in how organisations approach data protection
- Requires leadership – ICO views compliance as a board room matter
What stays the same (broadly)

- **Key concepts** – personal data, processing, data controllers, data processors etc
- **Data protection principles** – recognizable, but explicit reference to both transparency and accountability
- **Conditions for processing** – similar, but some changes
- **Data subject rights** – broadly recognizable (subject access, rectification, processing restrictions), but there are some new ones
- **International transfers** – NB Schrems consequences
- **Basic data security obligations** – but see new data security breach notification requirements
- **The ICO** – still a UK national supervisory authority
What’s changing?

- **Application** – direct effect in member states
- **Transparency** – enhanced fair processing transparency requirements
- **Consent** – concept of consent tightened; easier for individuals to withdraw
- **Accountability** – obligation to demonstrate compliance; use of privacy impact assessments
- **Administration** – increased administration and record keeping requirements
- **Data subject rights** – enhanced rights including subject access, increased ‘rights to be forgotten’ and data portability
- **Organisational principles** – data protection by design and by default
- **Data processors** – Statutory responsibility for data processors
- **Data protection officers** – mandatory for certain organisations
- **Breach notification** – mandatory breach notification for certain breaches
- **Supervisory authorities** – lead authority; formal consistency mechanism
- **Sanctions** – fines of up to 4% of worldwide turnover or €20M
The GDPR: preparing for change
Preparing for the GDPR

Basic preparatory steps

• ICO issued checklist with 12 steps to take for GDPR preparation
  • ICO will have key role in supplementing the provisions of GDPR with ‘GDPR friendly’ guidance
  • Original timetable slipped as a result of Brexit
  • ICO’s data protection reform website - https://ico.org.uk/for-organisations/data-protection-reform/

• Our 5 top recommendations
  • Resource and leadership
  • Data Mapping
  • Data minimisation
  • Review processing justifications
  • Contract reviews
Summary

- GDPR is a prompt to review how you use and handle personal data

- You can’t prepare unless you know what data you hold, why you hold it and what you are doing with it

- Start now by auditing and planning what you need to do

- Embrace change: use it as an opportunity to build trust and loyalty

- Brodies GDPR hub: [http://www.brodies.com/GDPR](http://www.brodies.com/GDPR)

“Trust... builds reputation. Both can be easily lost when people discover you haven’t been completely transparent... Trusted organisations will thrive.” – Elizabeth Denham, Information Commissioner
Brodies…

… is ranked as ‘band 1’ for charities and third sector advice in latest Legal500 independent legal directory
get and keep in touch

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