

Data Protection – Beware changes are afoot

The Information Commissioner's Office (ICO), the entity charged with overseeing and enforcing the Data Protection Act 1998 (the Act), is set to get greater powers to fine organisations for breaches of the Act

Any organisation that collects personal data about identifiable individuals such as its donors, beneficiaries, suppliers or employees is potentially a "data controller" for the purposes of the Act and, in light of the ICO's new powers, would be advised to review its policies and procedures to ensure that it is fully compliant with the Act. This includes, where necessary, notifying the ICO that it is a data controller and ensuring that it processes (i.e. stores, manages and uses) all personal data fairly and takes the necessary measures to ensure the security of the information.

At the moment, the powers of the ICO are somewhat limited as it can only impose fines in the following limited circumstances:

- 1. Where a data controller persistently breaches its obligations under the Act and has been served with an enforcement notice it can be prosecuted for failing to comply with that enforcement notice**
- 2. A person fails to notify the ICO of the processing being undertaken or of any changes to that processing can be prosecuted.**
- 3. A person knowingly or recklessly obtains, discloses or procures the disclosure of personal information, without the consent of the data controller.**

As such, at the moment if an organisation simply breaches the data protection principles set out in the Act, no matter how severe that breach might be, the ICO currently has no power to impose a fine unless that organisation is subject to an existing enforcement notice. Whilst high profile organisations may suffer significant adverse publicity as a result of any breach, many simply escape without any punishment from the ICO other than a slap on the wrist and perhaps the imposition of an enforcement notice to limit the chance of further breaches. As a result the ICO has been lobbying for additional powers for some time.

The new powers were actually included in The Criminal Justice and Immigration Act 2008 which became law in May 2008.

However, the relevant section has not yet come into force but it is expected to do so on 6 April 2010. The powers give the ICO the ability to levy a fine against organisations that

knowingly or recklessly fail to apply the data protection principles when they are aware that failure to do so is likely cause substantial damage or distress. The level of the fines will vary depending upon the breach but they can be up to £500,000 for the most serious breaches.

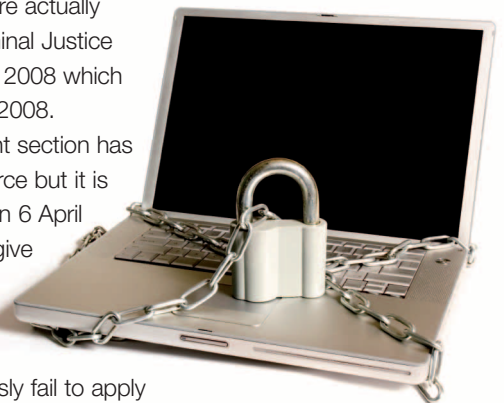
In addition the changes to the Act introduce the possibility of custodial sentences of up to 2 years where a person commits the existing offence, referred to above, of knowingly or recklessly obtaining, disclosing or procuring the disclosure of personal information, without the consent of the data controller.

Organisations should be aware that the Information Commissioner's Office is going about its business with increasing zeal following the high profile losses of data and it is unlikely that it will shy away from using its new powers.

Finally, provisions in the Coroners and Justice Act 2009 give the ICO additional audit powers in relation to public sector bodies which allow the ICO to carry out detailed compliance audits and to interview staff. The ICO will no doubt continue pushing for equivalent audit powers in relation to private and third sector organisations and those calls will only become louder if there are any further high profile breaches in the coming months.

In conclusion all organisations would be well advised to put their house in order sooner rather than later.

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Public Benefit Test

We often hear from clients who have not yet got to grips with what this test is all about. It is important that the basics of the public benefit test are understood, as not to do so could potentially result in several difficulties for your charity with the Charity Commission.

Some charities have failed the test already. Those concerned were fee paying schools without the availability of bursary schemes to supplement fees for those who might not be able to afford the fees. So what does affordability mean? Well at the moment the Charity Commission's measure of affordability is that the average person on 60% of the national average or median wage ought to be able to afford the facilities. If they cannot there is a risk that they will not be complying with the public

benefit test as the charity's benefit is not available to a sufficient section of the public.

There are other elements to the test such as is the charity's benefit unnecessarily restrictive i.e. is it available to all members of the public or a sufficient section of the public, and is there a detriment involved in delivery of the charity's benefit?

We would be happy to talk to you about any aspect of the public benefit test and discuss any areas of concern. In the first instance please contact Stephen Claus, Partner and Head of Charities and Social Enterprise at Brabners Chaffe Street on 0151 600 3341 or stephen.claus@brabnerscs.com

The New Vetting and Barring Scheme *part of the Safeguarding Vulnerable Groups Act 2006*

The burden of regulatory compliance on charities and other organisations working with children and vulnerable adults increased with effect from 12 October 2009 as a result of the initial implementation of the Safeguarding Vulnerable Groups Act 2006 (the Act). Criminal sanctions now apply to organisations and individuals who fail to comply.

Under the Act's new Vetting and Barring Scheme employers are now entitled to obtain an enhanced Criminal Records Bureau (CRB) check including checking the two barred lists maintained by the Independent Safeguarding Authority (ISA) in respect of any employee or volunteer who is undertaking regulated activity. Employers also have the new duty to share information with the ISA about individuals who pose a threat to vulnerable adults or children.

The Act has come into force in response to some of the recommendations of the Bichard Report which made recommendations on safeguarding as a result of the Soham murders. The new legislation has been much criticised particularly by organisations that use volunteers in their work with both children and vulnerable adults and as a result the Government has produced guidance entitled "Vetting and Barring Myth Buster" which seeks to allay fears and clarify the effect of the legislation.

The Vetting and Barring Scheme is part of the new safeguarding framework which aims to prevent unsuitable people from undertaking certain paid or voluntary work with children or vulnerable adults. Under the Scheme, which is not yet completely in force, all those wishing to work with vulnerable groups will be vetted and those who pose a risk of harm will be barred from working with vulnerable groups. The ISA will keep one list of those

barred from working with children and a separate list of those barred from working with vulnerable adults.

The legislation requires those who carry out either "regulated" or "controlled" activity (either in a paid or voluntary capacity) with children or vulnerable adults to register with the ISA.

Regulated activity covers anyone working closely with children or vulnerable adults on a frequent or intensive basis. Regulated activity is defined as either activity of a certain nature, for example teaching, caring and supervising; or activity in a certain place, for example schools, nurseries, hospitals and care homes. The definition of regulated activity also includes the holding of certain specified positions including trustees of children's charities and school governors.

Controlled activity includes activity in adult social care settings and further education settings as well as people working for specified organisations with access to health or Social Services records. It is anticipated that this category will affect only a small proportion of those falling within the remit of the Scheme and the ISA has recommended that the Government reconsider whether it is necessary to include it within the Scheme.

Registration is required for those undertaking regulated or controlled activity frequently, intensively or overnight. Frequently means once a month and intensively means three or more occasions in a period of 30 days.

Individuals will register with the ISA for a one-off fee of £64, with volunteers registering for free; their fee only being payable if at a later date they take up paid

employment. The fee includes the cost of an enhanced CRB disclosure. The ISA registration only considers the suitability of people to work with children or vulnerable adults and so organisations may still need to undertake a CRB check in respect of a particular worker depending on the scope of his or her role.

Organisations will need to ensure that employees or volunteers have registered with the ISA before they undertake work with vulnerable groups. Employers will be able to check the registration of a new employee or volunteer, subject to obtaining the individual's permission. From July 2010, once employers have registered an interest in their workers' ISA registration status employers will be notified by the ISA of any change in the registration status and whether the ISA deems them no longer suitable to work with vulnerable groups.

The ISA will make decisions from evidence and information from a range of sources including police, Social Services, professional regulators and employers. Employers now have a duty to refer to the ISA information on individuals who may pose a risk and such referrals must be made if an employee is dismissed or is under investigation because they have harmed or pose a risk of harm to a child or vulnerable person.

Referral forms are available on the ISA's website and it is advisable for organisations to amend child and vulnerable adult protection policies or create new policies which include the duty to make referrals and also attach copies of the referral forms. Staff and volunteers should receive training on the operation of such policies. It is a criminal offence not to refer such matters to the ISA.

It is also a criminal offence knowingly to allow a barred person to work in regulated activity. Organisations may want to amend their policies to reflect this and ensure staff and volunteers receive training accordingly.

The Scheme is being implemented over a 5 year period and from 26 July 2010 advertisements for new roles and job offers should also include the notice that the role is "subject to ISA registration". From November 2010 the requirement for individuals commencing a new role in regulated activities to register with the ISA before starting work will be in force and employers must check ISA registration for any new starters. It will be a criminal offence for employers to allow an individual to carry out regulated activity when they are either not ISA registered or are barred. From 1 April 2011 people who are already working in regulated activity and who have not moved into a new role may apply for ISA registration. This will happen in phases and organisations will be given information about who should join the Scheme and when. The final cut off date by which everyone working in both regulated and controlled activity must be ISA registered is 25 July 2015.

At this stage, we would recommend that organisations consider the activities they undertake and determine which roles involve regulated activity. Organisations should also consider the adequacy of their policies and procedures and whether amendments are required. In addition to training on the changes to any internal policies and procedures staff and volunteers, whose roles include regulated activity, should be made aware of their own responsibility as the Scheme is phased in.

BSC Training will be running a course entitled "Vetting and Barring" on Wednesday 9th June 2010 and Wednesday 3rd November 2010. The courses take place between 9:30am and 4:30pm in our Liverpool Office and are designed to help charities prepare themselves and their staff and volunteers to ensure they are operating within the requirements of the Scheme.

For further information about the training course or for specific advice relating to the above article please contact Deborah Walton, Senior Associate in the Charities team at Brabners Chaffe Street on

BCS Training - An Update

Our new training venture BCS Training is now up and running with "The Role of a Company Secretary" course proving to be one of our most popular courses so far.

For organisations dealing with vulnerable people we will be running a course on the new Vetting and Barring Scheme in Liverpool on 9th June and 3rd November. To book a place contact Gill Ashall, Training and Charity Support Executive on 0151 600 3362 or gillian.ashall@brabnerscs.com

If you are the Chief Executive or Senior Manager looking to develop your strategic management skills, you might be interested in our 2 day course "Translating a Vision into Business Reality" which we will be running on the following dates:

- **2nd and 3rd June at our Liverpool office, Horton House, Exchange Flags, Liverpool, L2 3YL**
- **16th and 17th June at our Preston office, 7-8 Chapel Street, Preston, PR1 8AN**
- **23rd and 24th June at our Manchester office, 55 King Street, Manchester, M2 4LQ.**

Again contact Gill Ashall for more information.

All of our courses are accredited with Ascentis (formerly Open College North West) and offer the delegate the opportunity to gain a recognised qualification.



Regional Cancer Research



Jane Simpson,
Chief Executive of
Clatterbridge Cancer
Research is our guest
writer for this edition of
CSE News.

Cancer is devastating enough as an illness without having to battle with the odds stacked against you.

Not surprisingly most people adopt the head in the sand approach to cancer, I mean if you don't have to think about it why would you? So if you are unlucky enough to be diagnosed then not only is it a huge shock but people start talking about your illness and your treatment in words you don't really understand. So right from the beginning there is a sense that you have lost control, so your life, or the life of someone you love is in someone else's hands and all you can do is trust that they know best and that they'll beat this thing for you.

And so that became my role in mum's cancer fight, I'd ask all the questions, get the big words explained, understand why they were making the treatment choices they were and keep checking that we were still playing the game of curing not living with.

I lost my mum to cancer in 2006 and this drove me to join CCR to make a real difference to fight this disease. We have ambitious growth plans at CCR for the simple reason that the more money we can raise, the more we can invest into cancer research and the more lives will be saved in our region.

This is why our work is so important – we fund world-class cancer research taking place right in the heart of Liverpool, with the aim of finding more effective personalised treatments for cancer patients right here in Merseyside and Cheshire.

Our name 'Clatterbridge' is synonymous with cancer in our region, but what many people do not realise is that

Clatterbridge Cancer Research is an independently run charity which receives no NHS funding and relies solely upon public donations to survive. In fact every year we need to raise at least £2 million just to continue with our vital work, that is nearly £5500 every day.

There are many ways you can have fun while helping us to raise the money we need to continue with our work. Each year we hold a range of events from parachute jumps to cycle rides, marathons, golf events and charity balls. You can also make a one-off donation or set up a direct debit through our website www.clatterbridge.org and every donation really does make a huge difference, even a donation of £5 will enable us to buy enough Petri-dishes to study the growth of tumour cells for one month.

Alternatively spare us some time – we always need dedicated volunteers and ambassadors, and whatever you do make sure you tell your friends and family about Clatterbridge Cancer Research and our work to reverse the shocking cancer statistics in our region – if we can get people talking about cancer we have a better chance of fighting it.

Jane Simpson is CEO of Clatterbridge Cancer Research and can be contacted on 0151 343 4300 or jane.simpson@ccrmail.org



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