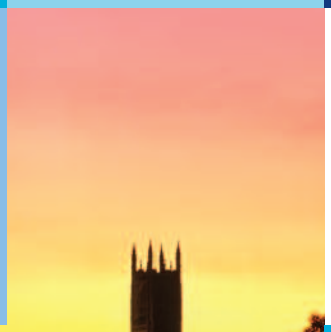
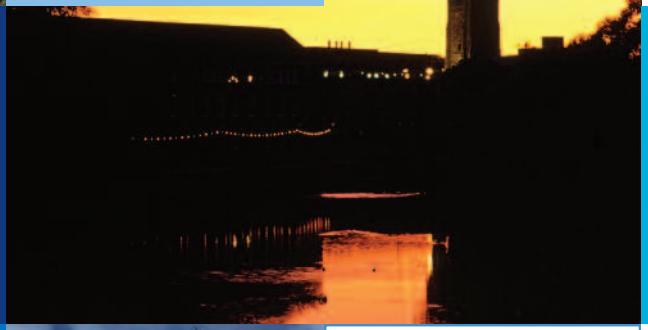
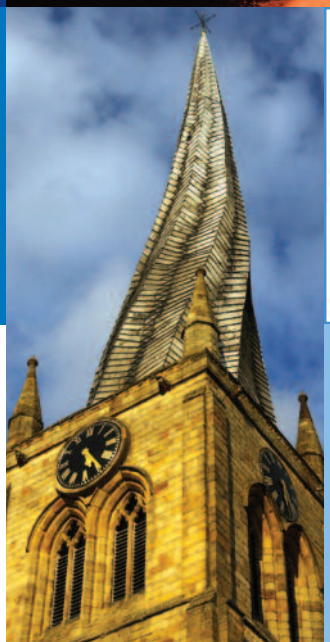
ConsortEM

The newsletter for EM LawShare

Summer 2016







EM LawShare

emlawshare.co.uk

Welcome

Welcome to the summer edition of Consort EM.

Plans for our biennial conference at Loughborough University in October (see page 3) are now well advanced and we think we have put together an exciting, informative and entertaining programme with some fun bits thrown in. The venue is a new one for us but, from two recent visits, I believe it is probably the best one yet with easy access, lots of car parking and first class facilities. Further information and invites will follow shortly.

One of the sessions at the conference will be a panel question and answer session on the future shape and role of local government. We are looking for three volunteers from member authorities to be on the panel, ideally each from a different type of authority. If you are interested, please get in touch. It promises to be an excellent session and your support in making it even better would be much appreciated.

The variety and scope of articles in this edition illustrates the range, complexity and ever changing nature of issues that public sector lawyers have to deal with, from non-attendance at schools (page 9), exit payments (page 5), various contract issues (pages 7 and 11), as well as how new regulations on data protection (page 13) and companies (page 15) will affect local government and others.

Then, dare I mention it, there is Brexit! We are currently working on inserting a course on its implications for the public sector into our current training programme. We are also confident that we will have a session on it from a leading QC at the conference.

If all this rapid change and upheaval is leaving you down and discouraged take a leaf out of Kirsty Cole's book. Kirsty, the subject of our 'Spotlight' feature in this edition (page 12), has been through a lot in her time at Newark and Sherwood District Council but still 'relishes the public sector ethos' and sees opportunities as well as challenges. Perhaps we should ask if she will do some counselling sessions at the conference!

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Member news

New members

We are delighted to welcome Arc Property Services Partnership Limited, East Cambridgeshire District Council and Herefordshire Council as new members of EM LawShare.

In addition, current members Central Bedfordshire and Northamptonshire County Council have combined with Cambridgeshire County Council to form LGSS Law Limited, a licensed alternative business structure, which will provide legal services to the three authorities.

EM LawShare spend

For the year 2015-2016, the total spend on legal services by members from our six partner firms was just under £3.5 million. This is a slight decrease from the £3.7 million spent in 2014-2015, even though the number of members increased from 84 to 105. Perhaps this is a sign of the increasing financial pressure on public sector bodies.

Are you using all the membership benefits?

Lots of you are using the free training programme, which is proving more popular than ever, but are you aware of the other benefits of membership? These benefits include:

- free phone help lines;
- out of hour emergency help lines;
- help with research and free use of library facilities;
- free use of partner firm meeting rooms; and
- expert advice on cost assessment and recovery.

To find out more about any of these benefits, simply log in to the secure members' area of the EM LawShare website and look under the 'Benefits' heading. If you do not know your password to the secure members' area, please email our website administrator Senara Shapland at senara.shapland@brownejacobson.com.

Difficulty recruiting?

If you are having difficulty recruiting and retaining high quality legal staff, you are not alone. One district council that was fed up with the frustration and cost of fruitless recruitment exercises decided to adopt a new approach. North West Leicestershire District Council, in conjunction with partner firm Browne Jacobson, developed a new model involving joint recruitment, mentoring, shared training and shadowing. It has proved successful and we are now working with their Head of Legal, Elizabeth Warhurst, to see if this model can be extended to other members. Watch this space.

The hidden pitfalls of the changes to public sector exit payments

The general provisions of the proposed changes to public sector exit payments are now widely known in the form of the £95,000 cap on the value of exit payments and the recovery of exit payments to high-earning employees, that is those receiving remuneration of £80,000 per year who are re-engaged in the public sector within 12 months. However, there are potential hidden pitfalls in these proposals that are not so obvious on first reading and of which local authorities need to be aware.

The potential for claims of negligent misstatement

It is a well established employment principle that the employer is under a duty to take reasonable care to ensure that information provided to transferring employees must be accurate, and that the statements of intent are capable of being fulfilled.

This was confirmed in the case of *Hagen & Ors v ICI Chemicals & Polymers Ltd & Ors* (2002) in a Transfer of Undertakings (Protection of Employment) Regulations (TUPE) context concerning the transfer of the central engineering resource section of ICI. Various promises were given and representations made by the transferor and transferee to the employees, especially about the post-transfer occupational pension entitlement. After the transfer, employees believed that the promises had not been honoured and that they had been misled and so they sued. The High Court decided that the transferor had been guilty of negligent misstatement in respect of pension arrangements as it had not properly explained the full impact and implications and therefore was in breach of its duty of care. The employees had reasonably relied on the transferor's representations in relation to their entitlements and damages could therefore be recovered.

This principle also seems wholly relevant where exit payments are concerned. A scenario could easily arise where the terms of an exit payment are being negotiated now but will not take effect until the employee's notice period ends, which may be after provisions for recovery and the cap come into force. The (draft) Recovery of Public Sector Exit Payment Regulations state that 'for the purposes of these Regulations, an exit payee is deemed to have received a qualifying exit payment on the same day as they left the employment or ceased to hold the office in respect of which the qualifying exit payment was made'.

There have been several examples where employees have been invited to volunteer for redundancy but have not been made aware that there could be a requirement to repay some, or all, of that payment if they return to work in the public sector within 12 months depending on when the recovery provisions come into force. Employers who have not fully appreciated the potential impact of these recovery provisions could be liable to pay damages to those employees who are consequently prejudiced.

The likelihood of this happening is probably greater in relation to the recovery provisions that are anticipated to come into force in the next few months, but could also apply in relation to the cap which is currently earmarked to take effect from October 2016.

Local authorities should be advising staff now on the implications of the recovery provisions and the cap, where they will apply, in relation to any exit payments proposed where the payment could take effect after the new provisions have come into force.

Contractual and policy issues

There may be further issues arising from the imposition of the cap in relation to long-standing contractual notice periods for high-earning local authority employees. These individuals may have long notice periods in their contracts of employment. Payments in lieu of notice are included in the current version of the draft regulations and would therefore be caught by the cap. It will be necessary for local authorities who have longer notice periods in the contracts of more senior and more highly paid employees to consider these consequences.

It will also be necessary for local authorities to review their redundancy policies with regard to both the recovery provisions and the cap. These policies will, in the vast majority of instances, have been agreed annually by full council with regard to the discretionary powers exercisable under the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006. There is also a further government consultation ongoing in relation to limiting public sector exit payment terms which may have an impact on these policies in the future.

TUPE and employees

The provisions in relation to the cap do not apply where the employee has an entitlement to certain exit provisions under the automatic transfer provisions of TUPE. This may result in a situation where some employees need to be treated preferentially in accordance with their terms and conditions and will be in a more advantageous position than their colleagues by virtue of the fact that the cap will not apply to them. Local authorities who have any staff with such legacy terms will need to be aware of them and be mindful of them in relation to any exit payments made.

Impact on low-earning long-serving employees

The provisions of the Enterprise Act 2016 which relate to the Local Government Pension Scheme will limit the entitlement to unreduced pension where the cost of providing those benefits exceeds the cap.

There is a possibility that an exit payment for a low-earning but long-serving local authority employee could exceed the £95,000 when the cost of their pension benefit is included.

This provision applies even in circumstances where the member of the scheme is over 55 and is eligible to take their pension if their employment ends on grounds of redundancy or business efficiency. The provisions require employees to fund any actuarial reduction resulting from early payment. The alternative is that they will have an ongoing reduction in their pension. It is unclear how the Local Government Pension Scheme will be able to accommodate partial payment of the employee entitlement to unreduced pension when the employer will be protected by the cap from fully funding the cost.

It remains to be seen whether local government will follow the health sector and the civil service where entitlement to unreduced pension has been withdrawn, save where employees elect to divert part of their cash compensation to fund it. Neither of these options is likely to be popular with retirees and could result in a significant reduction in the amount they expect to receive on retirement.

There is also clearly an age discrimination element in relation to the cap on the basis that it is likely to disadvantage older, longer-serving employees disproportionately to their younger colleagues.

Exodus or entrenchment

The potential financial implications for employees of the recovery provisions and, possibly to a greater extent, the cap on exit payments is likely to have an effect in terms of staff planning for local authorities. Local authorities may well see an increase in requests for early retirement or voluntary redundancy before the provisions come into force. This will leave local authorities with the decision of whether to delay staff exits in order to save money.

It is also likely that the effect of the exit payment provisions, once they come into force, will make voluntary redundancy a far less attractive proposition particularly in relation to older employees. Local authorities may find themselves with workforce planning issues as a result.

It is clear that local authorities need to be mindful of these potential hidden pitfalls now and to consider the impact they may have once they are in force.

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OJEU contract notices: which supporting documents must be published simultaneously?

When the Public Contracts Regulations 2015 came into force in February 2015, some debate arose around the extent of the documentation that needs to be made available when an Official Journal of the European Union (OJEU) contract notice is published. Under the previous regime, the Public Contracts Regulations 2006, it was permissible to issue the contract notice and then, sometime later, publish the draft contract and other documents. At first glance, the new regulations seemed to change that.

Regulation 53 introduces a requirement that a contract notice must include an internet address from where potential bidders can download the procurement documents. The new definition of procurement documents is broad:

> 'any document produced or referred to by the contracting authority to describe or determine elements of the procurement or the procedure, including the contract notice, the prior information notice where it is used as a means of calling for competition, the technical specifications, the descriptive document, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents.'

Interpretation 1: everything and the kitchen sink

A strict literal interpretation of this definition would seem to require a contracting authority to publish all of these documents at the same time as the contract notice. It could be taken one step further and interpreted to mean that the procurement documents must be in their final form when first published and cannot be amended after publication. However, given that there are certain procurement documents that only exist in draft form at the contract notice stage, such as a specification that is negotiated as part of a competitive dialogue, this second step is possibly one too far. Nonetheless, the need to have the whole suite of procurement documents ready at the same time as the OJEU notice may cause practical problems in certain time-pressured situations.

Interpretation 2: context sensitive

Adopting a more purposive approach, it is possible to interpret the definition of procurement documents as any document that exists at the relevant time. Thus, when a contracting authority publishes an OJEU notice, it should simultaneously make available any documents relating to the procurement that it has produced up until that point. As more documents are produced or referred to, these should be made available too. Taking this interpretation to its extreme, publishing an OJEU notice without any supporting documents at all would therefore not be an automatic contravention of regulation 53. See 'Ensuring compliance' below for further comment on this point.

CCS guidance

Usefully, guidance from the Crown Commercial Service (CCS) supports a pragmatic approach along the lines of interpretation 2. In *Guidance on electronic procurement & electronic communication* it states:

> 'CCS take the view that [the definition of procurement documents] provides a wide explanation of what might constitute procurement documents and that, where individual regulations refer to 'procurement documents', what is meant by that wording changes based on the different stages of the process that has been reached. As the procurement and competition becomes more crystallised, CCS expect more of the documents falling within that wide definition of procurement documents to be generated and therefore supplied. In contrast, at very early stages, fewer of the documents, if any, would be included. We believe a purposive interpretation is appropriate here.' (page 13)

For competitive procedure with negotiation, competitive dialogue and innovation partnership, where some documents may depend on the outcome of negotiations or dialogue, the CCS goes on to state:

> 'The rules do not specifically cover these cases where elements of the final documents may necessarily depend on the outcomes of negotiations or dialogues. However, Regulation 29(2) sets out some minimum information which must be provided about the requirement. This ... shall be sufficiently precise to enable suppliers to identify the nature and scope of the requirement and decide whether to request to participate'. A similar requirement is set out in Regulation 31(2) and (3) on the innovation partnership. Regulation 30(6) and 30(13) cover certain information which must be provided in the competitive dialogue.' (page 13)

Ensuring compliance

It is important to remember that, whatever approach is taken, contracting authorities must still comply with the fundamental principles of public procurement, namely: transparency, equal treatment and non-discrimination. In practical terms it would be difficult to meet these principles if no procurement documents were made available when the OJEU notice was published. Although regulation 29(2) relates to a competitive procedure with negotiation, it serves as an excellent barometer for all the procedures: the documents available to the market must be 'sufficiently precise to enable suppliers to identify the nature and scope of the requirement and decide whether to request to participate'.

Therefore, the contracting authority must avoid providing insufficient or unclear information at the start of the procurement. This would prevent the situation where potential suppliers argue that they would have expressed an interest or submitted a bid had information that was only disclosed later been available from the beginning.

From a commercial perspective, too, it is important that an authority has a sufficiently advanced idea of the works, services or goods it requires before initiating the procurement process. It should be confident that suppliers understand the nature and scope of the procurement so that any submissions made at this early stage can be appropriately assessed.

As a minimum, and this will vary according to the type of procurement procedure, it would be prudent to make any pre-qualification documentation available, alongside the OJEU contract notice. This should include any assessment methodology and other related information in sufficient detail for suppliers to understand both the nature and the scope of the contract being procured, whether this is in the form of a draft specification, draft contract or other procurement document.

This article discusses a UK law, the Public Contracts Regulations 2015, that is an implementation of an EU directive (2014/24/EU). When the UK leaves the EU, the Public Contracts Regulations will continue to be UK law as it is enshrined in our domestic statute, but future governments will have the option to amend or repeal it. A number of commentators have suggested that this may not be the government of the day's top priority, or that our eventual relationship with the EU may mandate keeping the regulation as it is. In short, there is a lot of uncertainty, but for now the Public Contracts Regulations 2015 is still good law.

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School's out?

There was extensive press coverage of the High Court decision of 13 May 2016 in favour of Jon Platt in his long-running battle with Isle of Wight Council. Mr Platt took his daughter out of school for seven days in April 2015 for a family holiday when no other dates were available. He was fined for her unauthorised absence and, when he did not pay, was prosecuted. Section 444 of the Education Act 1996 requires parents to ensure that their child attends school regularly but the Act does not define what 'regularly' means. The magistrates' court found that there was no case to answer against Mr Platt and this decision was upheld by the High Court on the basis that Mr Platt's daughter's attendance for the whole of the school year was more than 92 per cent, so in the wider context she had attended school regularly.

The interesting point about this case is the debate about the exact meaning of regular attendance. All that the High Court has said is that the overall level of attendance can be looked at in the context of the absence. What that means for parents and schools, though, is that every case will need to be looked at individually when trying to decide whether the child's overall attendance has been regular.

Parents' groups have complained for many years about the high cost of holidays during school vacations, compared with other times. However, the government says that its evidence suggests that every extra day of school missed can affect a pupil's chance of gaining good GCSEs, which has a lasting effect on their life chances. Its stance since the High Court decision has, if anything, hardened. The initial response from Schools Minister Nick Gibb was that he was awaiting the judgment, after which he would set out the government's response. He also noted that the ruling was 'a significant threat to one of the government's most important achievements over the last six years: improving school attendance. For this reason, the government will do everything in its power to ensure head teachers are able to keep children in school.'

Mr Gibb also urged schools and academies to club together and change their term and holiday dates. His solution to beat the travel agents appeared to lie with the schools themselves, rather than the parents. It remains to be seen whether they will heed his call. The press has been trumpeting a victory for common sense. However, many suspect that although Mr Platt had won that particular battle, his war against the council, or perhaps the government, was far from over.

This has indeed proved to be the case because there have been two related developments. First, the council indicated its intention to appeal against the High Court's decision. Second, the Schools Minister has instructed schools effectively to ignore the High Court ruling and continue to apply the existing regulations which provide for parents to be fined in the event of the unauthorised absence of their children.

The fact that the decision is being appealed is not surprising given the government's initial response and the fact that they introduced stricter rules on term-time absences in 2013. These rules provided that head teachers could only authorise such absences in exceptional circumstances. Prior to this, headteachers had discretionary powers to grant up to two weeks of absence for pupils who otherwise had good attendance records.

The government's involvement is clear and unequivocal. A spokesperson for Isle of Wight Council was quoted as saying that they had received a formal request from the government to lodge the appeal against the High Court decision. Their initial instincts had been not to do so in view of the additional expenditure and limited council funds that an appeal would have required. However, the council leader has confirmed the government's formal request, due to the local and national importance of the issue at the heart of the case – what constitutes regular attendance. As the Department for Education has committed to cover all the costs of the appeal and to make a contribution to the costs that the council has already incurred, an appeal has indeed been lodged.

Mr Platt, who has been reported as having set up a company called School Fines Refunds Limited to assist parents who have paid fines in similar circumstances to reclaim the money, described himself as shocked at the council's decision to appeal.

As for the government, the Schools Minister has confirmed that the response to parents asking local authorities to rescind any penalties paid in such circumstances is a refusal. Notwithstanding the appeal, he also confirmed that the government would set out any additional steps that were necessary to secure children's attendance at school in due course.

Mr Platt may have been surprised that the government intends to continue to fight this particular war, but many of us would have been even more surprised had they not done so. The battle is clearly set to continue and the outcome of the forthcoming appeal will be keenly awaited by all involved.

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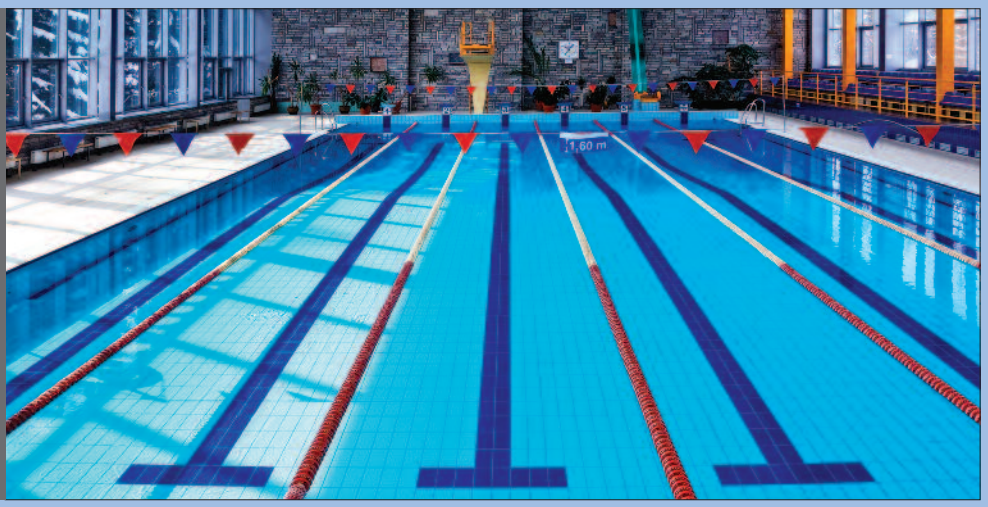
Contract or concession? The pace heats up

As local authorities become increasingly entrepreneurial in their efforts to ward off the cold winds of austerity, activities in terms of traditional purchasing have become a little trite.



Firms are dealing with a number of situations where, although a local authority may be seeking a service provider, the authority itself will not pay for that service. The service may be self-funding, or the authority may simply make it available for members of the public to use and direct customers towards the service provider, thus potentially generating an income as a result.

Examples include:

- pay and display car parking;
- pest control services;
- debt enforcement activity;
- leisure services;
- burial and cremation;
- use of venues for events and catering; and
- retail outlets within council premises.

The legal analysis of these relationships can be difficult. Certainly there has been a traditional view that 'this is a procurement, issue the OJEU (Official Journal of the European Union) notice', but under the Public Contracts Regulations 2015 a contract is only a public contract if it relates to the provision of goods or services to the authority for 'pecuniary interest', that is payment by the council.

If the council is not paying, either because they receive monies or others pay for the service, then the correct analysis would seem to be that the contract is not one to which the painful process of OJEU, PQQ (pre-qualification questionnaire), ITT (invitation to tender) and other awkward acronyms need apply.

This view has recently been confirmed in the High Court case of *Newlyn v London Borough of Waltham Forest* (11 April 2016). An enforcement (bailiff) company mounted a procurement challenge under the Public Contracts Regulations 2015 against a contract entered into by a local authority. Its claim was struck out on the basis that, even though the project was run by the authority via an OJEU contract procedure, it was never, in the view of the Technology and Construction Court division of the High Court (Mr Justice Coulson), a 'procurement' and the challenge was 'unarguable in fact and law'. This is because the enforcement company ran the contract on the basis that it was self-funding. As is commonly the case; it derived its contract income from fees paid by the council's debtors, not from any monies payable by the council.

Let joy be ... well, actually, rather confined ... as the exclusion of this sort of service concession is now governed by a new regime contained within the Concession Contracts Regulations 2016 published on 11 March and effective from 18 April 2016.

The bad news is that under these regulations a contract such as this, which is a concession, defined as 'the right to exploit the services that are the subject of the contract ... together with payment', is now subject to the requirement to issue a form of OJEU notice and to follow what can be best described as a slimmed down version of the process for awarding contracts generally. However, the process to be followed is simpler.

Although there is a prescribed form of notice, Regulation 30 talks of 'freedom to organise the procedure ... subject to compliance with these regulations', and the threshold above which concessions need to be advised is subject to a minimum 'whole-life' value of €5 million, taking into account the income to be derived by the operator using an 'objective method specified in the concession documents', which could be somewhat challenging.

The result of this is that while the new regime needs to be carefully considered on a project by project basis, authorities should have a careful look at whether either or none of these regimes apply when making contracts.

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Spotlight on ...

Kirsty Cole,

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In each edition of ConsortEM, we shine a light on a member to show the variety of roles within the consortium. This month, Kirsty provides an insight into working as part of a council's corporate management team.

How long have you been with Newark and Sherwood District Council?

I joined the council as Senior Solicitor in October 1982 having previously been at South Kesteven District Council and in private practice.

I have held a variety of roles here and have managed a diverse range of council functions.

I currently hold the position of Deputy Chief Executive and Monitoring Officer.

What does your role entail?

I am a member of the council's corporate management team where my role involves deputising for the chief executive and acting as the council's monitoring officer.

I directly manage democratic services, the policy and commissioning and performance team, planning and customer services. We operate a fluid management structure and I am regularly involved in a broad range of issues including those relating to legal services.

I also play a key role in major projects and transformation.

To whom do you report? What is the structure of your team?

I report directly to the chief executive but I work closely with my corporate management team colleagues and our business managers.

What are the most pressing issues for you at the moment?

Our most pressing issue continues to be the need to find budget savings while maintaining the same level of service to the public.

We have been innovative in our approach to meeting budget challenges, undertaking major capital projects in order to stimulate local economy. We have just completed the building of a new leisure centre in Newark, part-funded by a major redevelopment scheme in Newark town centre. We opened a National Civil War Centre which has been successfully integrated with our local theatre. We are also in the process of building new council offices.

What regulatory issues are on the horizon?

We are trying hard to anticipate future needs and demands with an innovative and entrepreneurial approach. Our mantra has always been to find a way to do what we want to do within legal boundaries and with a full appreciation of potential risks and challenges, rather than finding a reason not to do things. Our priorities seek to identify future needs and demands. For example, there is an increase in the number of older people and there is also a greater demand for affordable housing. We are currently undertaking a major scheme to provide extra-care housing for elderly people on land owned by the district council, with match funding successfully awarded by the Homes and Communities Agency and the county council.

We have an arm's length company to manage our housing stock and have recently set up a Teckal company to run our leisure services.

We are keeping our eye on changes proposed by the Solicitors Regulation Authority in order to better understand the challenges and opportunities that this will present.

How does Newark and Sherwood District Council compare with other places you have worked?

I relish the public sector ethos and am proud to have been given the opportunity to make a real difference to the district in which I live and work.

What law would you like to see changed?

The Housing and Planning Act 2016 as it threatens the future of social housing. I remain sceptical about the proposal to privatise planning services.

What is the best piece of advice you have ever received?

If you do not know the answer use common sense and 99 per cent of the time you will be right.

Finally two truths and one lie in any order:

- I met Ken Dodd when he appeared in Newark at our local theatre;
- I met Princess Anne at a Women's Institute event in Newark Town Hall; and
- I met David Starkey at our National Civil War Centre in Newark.

The General Data Protection Regulation: How will it impact local authorities?

Over the next two years, the issue of data protection is likely to ascend the ever growing list of priorities for all local authorities in the UK. The General Data Protection Regulation will come into force on 25 May 2018 and it will have a direct effect in all member states of the EU so there will be no need for domestic legislators to take steps to incorporate the regulation.

It appears very unlikely that the UK will have formally left the EU by 25 May 2018 and therefore the regulation will have a direct effect in the UK for at least a short period of time.

The General Data Protection Regulation is the most significant overhaul of data protection laws in the EU for 21 years. Not only will it inflict more stringent obligations on data controllers and data processors alike, it will also increase the maximum financial penalty which the Information Commissioner's Office can impose from £500,000 to at least €20 million.

Following the outcome of the EU referendum, the long-term application of the General Data Protection Regulation in the UK is unknown. While the regulation will no longer automatically apply once the UK has left the EU, it may be directly applicable in the UK for a number of months, if not years, depending on how protracted the leaving negotiations become.

In the meantime, it would be prudent for public authorities to consider the potential impact of the regulation and any steps they should take now to ensure compliance.

Background

The Data Protection Act 1998 has remained largely unchanged since the start of the millennium.

Vast amounts of data can now be collected, transferred, analysed and used with relative ease. Consequently, there is a growing argument that, in order to maximise the hidden potential of all of that data, the legislative burden imposed on those who control or process data should be lightened. However, the EU has remained steadfast in its approach to data protection: an individual's right to control their own personal data must be preserved. The General Data Protection Regulation seeks to establish the EU as the global leader for the protection of individuals' personal data. The regulation will bring in some significant changes. The key changes that will impact on local authorities will be explored below.

What does it cover?

The definition of personal data has been expanded to reflect the importance of the online element of our lives. In particular, online identifiers, device identifiers, cookie IDs and IP addresses are now all expressly included in the definition of personal data.

The scope of sensitive personal data has been expanded to keep up with advances in medical technology. Genetic data and biometric data, where processed to uniquely identify a person, now expressly fall within the definition of sensitive personal data.

Informing and consent

The central aim of the regulation is to ensure that individuals are able to control their own personal data. To help achieve this aim data controllers, such as local authorities, must inform individuals how they will process the individual's data before the processing takes place. This is not a new obligation but the quantity of information that needs to be provided-has increased. The additional information includes:

- the legal basis for processing the data;
- the period for which the data shall be retained;
- that the individual has a right to complain to the Information Commissioner's Office;
- whether there is a statutory or contractual requirement to provide the data; and
- the consequence of not providing the data.

The legal basis for processing personal data will often be the possession of an individual's consent. This is unlikely to change under the regulation but the hurdles that organisations will need to clear to obtain that consent will be raised. For example, the regulation makes it clear that consent must be a positive indication of the individual's agreement to process their personal data; consent cannot be inferred from silence, pre-ticked boxes or inactivity.

In order to obtain valid consent, the consent must be:

- freely given;
- specific;
- informed; and
- unambiguous.

The individual must also have the right to withdraw consent at any time. If any of these elements is missing, the consent is likely to be invalid.

If an authority is processing data for various different purposes, it will need to get separate consent for each purpose. The regulation creates a presumption that bundling consents will render the consent invalid.

The regulation will also place a greater onus on local authorities to be able to demonstrate that consent was given. Therefore, authorities will need to ensure that there is an adequate audit trail for the provision of consent.

For the first time, this regulation provides separate requirements for obtaining consent from children. Where children are younger than 13 years old, parental consent for processing their data must be obtained prior to the processing. Member states can set their own rules for the consent requirements for 13 to 15 years. We do not yet know how the UK will handle the consent for children aged between 13 and 15.

Right to be forgotten

The right to be forgotten allows individuals to require their data to be erased if the processing does not satisfy the requirements of the General Data Protection Regulation or the individual withdraws consent. Where an authority receives such a request, it will need to notify anyone with whom it has shared the personal data unless it would be impossible to do so or require disproportionate effort.

Subject access

All local authorities will be familiar with the subject access provisions of the Data Protection Act. The rights of individuals to request the information which an authority holds about them will continue under the General Data Protection Regulation but with a few alterations.

First, the time limit to respond to a subject access request will be reduced from 40 days, as it is under the current regime, to one month. This is a significant decrease so it would be worthwhile reviewing your process for handling such requests to see where time can be saved.

Data controllers will also have to provide requestors with supplemental information which includes:

- the purpose of the processing;
- the categories of data processed;
- the recipients of the data;
- the envisaged retention period;
- the individual's rights of rectification and erasure;
- the source of the data; and
- any regulated automated decision taking.

The regulation also introduces the concept of portability. Subject to various conditions, the most notable being that the data is processed by automated means, individuals are entitled to request that their data is provided in a commonly used electronic form to enable them to port the data to another provider.

Data breaches

The aspects of the General Data Protection Regulation that have perhaps caused most concern are the provisions relating to enforcement.

First, controllers are under a duty to notify the Information Commissioner's Office when there has been a data breach where an individual is likely to suffer some form of damage. If a data breach is not reported and the individual is likely to suffer damage, the Information Commissioner's Office has the power to issue a local authority with a fine of up to €10 million or, if higher, two per cent of the authority's annual turnover.

For other breaches of the regulation, the upper limit of the fine will be doubled, that is €20 million or four per cent of the annual turnover.

Active compliance

The General Data Protection Regulation will require local authorities to actively comply with all of its obligations. For example, authorities will need to implement:

- data protection by design, that is to have a thought-out approach to data protection;
- staff training programmes;
- preparation of privacy impact assessments; and
- an audit of personal data held.

What to do now

The Information Commissioner's Office has already begun to publish guidance on the steps that data controllers will need to consider in order to ensure compliance with the regulation. With less than two years left to implement the necessary changes, local authorities should be raising awareness about the additional obligations and risks internally. They should also be reviewing the personal data that they hold, establishing with whom the data is shared and reviewing all data sharing agreements and privacy notices.

The General Data Protection Regulation is a timely piece of legislation which ensures that the right for individuals to control their personal data is protected irrespective of future technological advances. Complying with it will be difficult for many data controllers but the more that is done to establish the personal data which you hold and to update policies and procedures in good time before May 2018, the easier that transition will be.

While we do not yet know what data protection legislation the UK will adopt when it leaves the EU, there is a very real possibility that the new legislation, whether an amended version of the Data Protection Act or otherwise, will feature many of the key requirements contained in the General Data Protection Regulation.

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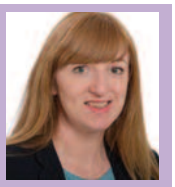

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Do all companies have a PSC register now?

From 6 April 2016 all unlisted UK companies and limited liability partnerships (LLPs) must have a new statutory register identifying people with significant control (PSC) over them. This is known as a PSC register.

Companies and LLPs should now have an internal PSC register and will need to file PSC information at Companies House from 30 June 2016, either as part of the new annual confirmation process that replaces the annual return or on a new company incorporation.

Who must have a PSC register?

All unlisted UK companies, community interest companies, Societas Europaea and LLPs must have a PSC register, irrespective of their size. There is no exception for dormant companies.

The regime does not currently extend to cooperative societies, community benefit societies or charitable incorporated associations.

Overseas companies and companies listed on certain regulated markets, such as the London Stock Exchange and AIM, are excluded from the requirement to have a PSC register.

Local authorities do not need to have such a register but any trading subsidiaries, dormant subsidiaries or joint venture companies controlled by two local authorities would be caught.

What is required?

In summary, a company needs to:

- keep an internal register of people with significant control;
- take reasonable steps to identify persons who should be registered;
- enter the required information on the PSC register and keep it updated;
- make the PSC register available for inspection; and
- file PSC information at Companies House from 30 June 2016 onwards.

People with significant control are under a corresponding duty to notify the company of their interest in certain circumstances.

What are the consequences for breach?

Failure to comply is a criminal offence, which can result in a fine and, in some cases, imprisonment of up to two years.

Offences can be committed by the company and its officers and also by people with significant control if they fail to provide the necessary information to the company. If a relevant person fails to respond to a company's formal requests for PSC information this may eventually result in the company being able to apply restrictions on the affected shares such as a restriction on transfer.

What does the PSC register include?

The PSC register must record stipulated details about people with significant control over the company, such as name, address, and date of birth. It must contain official wording, as set out in the government guidance, outlining what level of control they have.

All companies must keep a PSC register and it can never be blank; even if they have no people with significant control, or are still investigating who may be a PSC, there is prescribed wording to be included.

Who or what is a person with significant control?

Broadly speaking, a person has significant control if he or she:

- holds, directly or indirectly, more than 25 per cent of the nominal value of the company's issued shares;
- holds, directly or indirectly, more than 25 per cent of the voting rights in the company;
- holds the right, directly or indirectly, to appoint or remove a majority of the board of directors of the company;
- exercises or has the right to exercise significant influence or control over the company; or
- exercises or has the right to exercise significant influence or control over a trust or firm which itself meets any of the above conditions.

The fourth condition is potentially very wide and statutory guidance has sought to clarify whom this is intended to catch. This guidance also provides examples of excepted roles, which would not generally be caught.

By and large, professional advisors, company directors and company employees would not be caught by this fourth condition unless they had other opportunities to exercise influence or control or if the nature of their role was more extensive than is commonly understood. Similarly, in a shareholders'

agreement a minority shareholder with veto rights purely to protect their minority interest would not usually be caught under the fourth condition.

How does this apply to a company limited by guarantee rather than shares?

A company limited by guarantee without a share capital may well have articles of association that prevent the distribution of profits or capital, especially for example where it is also a registered charity. If your company cannot distribute profits or capital it will have no person with significant control who meets condition one but it might well have someone who meets one or more of conditions two to five. These will apply notwithstanding that it does not have share capital.

Where your company's constitution does allow for the distribution of profits or capital, a person will fulfil condition one if that person holds a right to share in more than 25 per cent of your company's profits or capital. Quantification of a person's interest under condition one must be entered on the register using official prescribed wording. Confusingly, the official wording refers to shares because this is the most common company form, but for a company limited by guarantee you should consider shares to mean profit or capital.

What if my company is owned by a company rather than an individual?

So far we have been considering control of a company by an individual. Of course, many companies are not directly owned by individuals; they may be owned by another company.

The PSC regime tries to make life more straightforward for those companies forming part of a wider group by having the concept of relevant legal entities. Where a UK unlisted company is owned by another legal entity, details of that legal entity can be entered into its PSC register without looking further at who owns that immediate parent, provided that the legal entity in question is a registrable relevant legal entity. This will be the case if it:

- meets one or more of the control conditions one to four above;
- is a UK registered company or LLP that maintains its own PSC register or is a company with shares listed on certain markets, such as AIM; and
- is the first such legal entity in the ownership chain above the company.

So, for UK companies that are wholly owned by another UK company the position is straightforward. They will record details of their immediate parent company in their PSC register. The logic behind this is that if someone wants to know the individuals at the very top of the group structure they can follow the chain of PSC registers of all the UK companies in between in order to identify them.

What information does a company record in its PSC register for a relevant legal entity?

When recording a relevant legal entity in your PSC register you must include the following:

- company name;
- legal form and governing law;
- registered or principal office;
- the register of companies in which it is listed and its registration number;
- date on which the entity became registrable as a relevant legal entity. For entities in place when the new law came in, put 6 April 2016;
- any additional registrations the relevant legal entity has, such as being registered with the Charity Commission; and
- which of the conditions for being a relevant legal entity are met. You must include all that are relevant and there is a prescribed wording that must be used.

What if my company is wholly or jointly owned by local authorities?

Local authorities do not fall within the definition of relevant legal entities. However, for PSC purposes, the new law does treat certain entities as if they are individuals. This means that no further investigation as to their ownership or control is required. They can simply be recorded in the PSC register. Such entities include national or local governments and international organisations.

For these entities you must include the following information in your PSC register:

- name;
- principal office;
- legal form;
- law by which it is governed;
- the date they became a person with significant control; and
- which conditions for being a person with significant control they meet.

Therefore, if you have a company that is wholly or jointly owned by local authorities or another government body, you record the above details in your PSC register for each such entity once you have taken reasonable steps to check that they have significant control and are confident that the details you have are accurate.

You should keep an audit trail of the steps you have taken to reach this conclusion and should have processes in place to ensure that any updates to the PSC register are made if the ownership or control of the company changes in the future.

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2016/17 EM Lawshare Training Programme

We are delighted to announce a diverse programme of over 40 training events in 2016/17 from our partners Bevan Brittan, Browne Jacobson, Freeths, Geldards, Sharpe Pritchard and Weightmans.

Courses will be presented by lawyers from these six firms, each of whom are specialists in their field and some courses will be jointly presented by lawyers from member authorities.

Courses will be held in the East Midlands; Leicester, Nottingham and Derby, with some courses repeated in Birmingham, Sheffield, Milton Keynes and Cambridge.

We also offer a number of courses via video conferencing to Birmingham, Leicester, Manchester, Milton Keynes and Sheffield.

Date	Title	Location
14 July	**Landlord and Tenant Update** (Intermediate)	**Nottingham**
20 July	**Annual Local Government Update** Repeated from East Midlands (All levels)	**Milton Keynes**
15 Sept	**Landlord and Tenant Update** Repeated from East Midlands (Intermediate)	**Birmingham**
27 Sept	**Practical Session on Committees and Governance** (Advanced)	**Nottingham**
28 Sept	**Annual Local Government Update** Repeated from East Midlands (All levels)	**Cambridge**
29 Sept	**Adult Social Care Update** Repeated from Sheffield (Intermediate)	**Leicester**
4 Oct	**Licensing Update** (Intermediate)	**Nottingham**
4 Oct	**Licencing Workshop** Number limited to 25 (Intermediate)	**Nottingham**
6 Oct	**Housing Development and Regeneration** Repeated from East Midlands (Level TBC)	**Birmingham**
12 Oct	**Employment** Repeated from East Midlands (All levels)	**Birmingham**
20 Oct	**Procurement Update** Repeated from East Midlands (Intermediate)	**Sheffield**

Detailed course outlines will be available on www.emlawshare.co.uk

Cancellations and non–attendance

If you cannot attend a course you are booked on you should cancel by emailing julie.scheller@freeths.co.uk or phone 0845 272 5701. Your email should state clearly the title and date of the course and should be sent at least 48 hours before the course is due to start. We appreciate that this may not be possible in all circumstances, but if you fail to attend and fail to give the required notice on four occasions in a twelve month period we reserve the right to require a £50 deposit before accepting any future bookings from you. The deposit will be returned if you do attend.

N.B. It is your responsibility to sign in at the course and if you do not you are deemed to be absent for the purposes of this policy.

New approach to continuing competence

From November 2016 the SRA has removed the requirement for solicitors to undertake 16 hours per year of CPD and have replaced this with a requirement for individuals to make an annual declaration confirming they have reflected on their practice and addressed any identified learning and development needs.

EM Lawshare has considered the Competence Statement and the new requirements in detail and tailored the 2016/17 Training Programme to be fit for purpose under the new approach.

Detailed course outlines will be available on www.emlawshare.co.uk

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