CHURCHES LEGISLATION ADVISORY SERVICE

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CLAS CIRCULAR
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Disclaimer

CLAS is not qualified to advise on the legal and technical problems of members and does not undertake to do so. Though we take every care to provide a service of high quality, neither CLAS, the Secretary nor the Governors undertakes any liability for any error or omission in the information supplied.

It would be very helpful if members could let us know of anything that appears to indicate developments of policy or practice on the part of Government or other matters of general concern that should be pursued.

CHARITIES & CHARITY LAW

Automatic disqualification and waiver

For information and possibly for action

The Charity Commission has published a reminder that **on 1 August 2018** the law will change to extend the scope of who will be disqualified from running a charity. More reasons for disqualification are being added and the rules will also apply to some charity chief executives and finance directors and those in equivalent roles.

The Commission urges charity trustees and others who may possibly be affected to read its guidance for charities on disqualification *and to apply for a waiver if needed*.

[Source: Charity Commission – 24 June]

Charity Commission: changes to the update charity details service

For information

The Charity Commission has issued a further notice on updating charity details.

The Charities Act 2011 requires all registered charities to keep their details up to. (Obviously this does not apply to excepted religion charities that are below the registration threshold, but even in the excepted denominations there a lot of congregations that have had to register.) The Commission will be improving the current updating service so that it will be possible to keep a regular check on charities' details and update them when they change.

Because of General Data Protection Regulation (GDPR), the Commission must let people know if any of their personal information is updated on the Register of Charities: the simplest and quickest way of doing so is to e-mail people when their data is updated. The Commission will therefore be asking charities to check that the register details for their trustees remain up to date. This includes adding any new trustees and their contact details and removing the details of those who are no longer trustees. The Commission is planning for the improved update

charity details service to go live later this summer, at the same time as the 2018 Annual Return.

As part of its service improvements, the Commission intends to ask all trustees to supply an e-mail address, *or to confirm that they do not have one*.

It appeared that the Commission's original intention – as expressed in the consultation document on the Annual Return 2018 – was to require every trustee to supply an e-mail address. In our response, we pointed out that not everyone has an e-mail address, that about 9 per cent of the population does not use computers at all and that it was difficult to see on what legal basis possession of an e-mail address could become a necessary qualification for charity trusteeship. Evidently, any element of compulsion has now been abandoned – though, obviously, it is in the interests of trustees as much as those of the Commission to supply an e-mail address if at all possible.

[Source: Charity Commission – 2 July]

Consultation on ICO charge exemptions

For information and possibly for action

The Information Commissioner's Office (ICO) has launched a consultation on exemptions from payment of ICO charges. The work of the ICO is funded by charges to companies and organisations that process personal data. Though some non-profit activities are currently exempt, the scope of these activities is small, including only "establishing or maintaining membership; supporting a not for profit body or association or providing or administering activities for either the members or for those who have regular contact with the organisation".

Under the current regulations charities are not fully exempt, however they are automatically classified as tier 1 organisations, meaning they pay the lowest charge (£40). The consultation has been established to review whether current ICO charge exemptions are appropriate and whether additional exemptions should be considered.

Of particular interest to charities, is the call for responses on whether the automatic qualification of tier 1 status is still appropriate.

Responses should be submitted online by **1 August 2018**.

[Source: ICO - 22 June]

FAITH & SOCIETY

Assisted dying

For information

In November 2014, Mr Noel Conway was diagnosed with Motor Neurone Disease. A time will come when he will be told that he has less than six months to live and he wishes at that point, while he still has the capacity to make the decision, to be assisted into a peaceful and dignified death. Under section 2(1) of the Suicide Act 1961 (Criminal liability for complicity in another's suicide), however, it is an offence to assist someone to commit suicide. Mr Conway sought a declaration under section 4(2) of the Human Rights Act 1998 that section 2(1) of the Suicide Act 1961 is incompatible with his rights under Articles 8(1) (respect for private and family life and 14 (prohibition of discrimination) ECHR. In *R (Conway) v Secretary of State for Justice* [2017] EWHC 640 (Admin), on a split decision, the Divisional Court had refused his application to bring judicial review proceedings. In *R (Conway) v The Secretary of State for Justice & Ors* [2018] EWCA Civ 1431, he was again unsuccessful.

The Court of Appeal began from the principle that the right of an individual to decide how and when to end his or her life is an aspect of the right to respect for private life protected by Article 8 of the Convention [120] and that section 2 of the 1961 Act interferes with that right in a way that can be only valid if it is "necessary in a democratic society" for one or more of the purposes specified in Article 8(2) - in this context, the protection of health and morals and the protection of the rights of others [121]. When considering whether legislative measures satisfied the requirements of Article 8(2) ECHR.

The Court of Appeal could find no error of principle in the reasoning of the Divisional Court, which had held, *inter alia*, (at [97]) that the prohibition reinforced a moral view about the sanctity of life and promoted trust and confidence between doctors and their patients. The Divisional Court had also explained (at [109]) why there were powerful constitutional reasons for it to respect Parliament's assessment of the necessity of maintaining section 2 and (at [110]) why Parliament was better placed than the court to make the relevant assessment regarding the likely impact of changing the law. It had also concluded (at [114]) that the prohibition in section 2 of the 1961 Act struck a fair balance between the interests of the wider community and the interests of people in the position of Mr Conway [206].

In the circumstances, the Court of Appeal concluded that the approach and conclusions of the Divisional Court could not be faulted [207]. Appeal dismissed [208].

[Source: BAILII – 27 June: CLAS summary]

Gender Recognition Act consultation

For information and possibly for action

On 3 July, the Government issued a consultation document on how best to reform the Gender Recognition Act 2004. The Government has also a produced a *Factsheet: Trans people in the UK*.

Responses can be made online, by e-mail, or in writing to Department for Education, Sanctuary Buildings, Great Smith Street London, SW1P 3BT.

The consultation closes at **11 pm on 19 October**.

[Source: Government Equalities Office – 3 July]

Humanist weddings in Northern Ireland

For information

The Northern Ireland Court of Appeal has handed down judgment in the case of *Smyth, Re Judicial Review*. The issue was the refusal to allow Ms Laura Lacole (*alias* Smyth) and her fiancé Eunan O'Kane to have a humanist wedding. In the lower Court, the trial judge, Colton J, had quashed the General Register Office's decision to refuse an application to authorise a humanist wedding because the refusal breached the applicant's ECHR rights. He ordered the GRO to grant the application and gave a temporary authorisation for a humanist celebrant to perform a legally valid and binding humanist wedding ceremony – and the couple were duly married in a humanist ceremony in June 2017.

The Attorney General for Northern Ireland appealed; and in a slightly confusing judgment (slightly confusing, that is, for non-specialists like us) the Court of Appeal allowed the Attorney's appeal on the grounds that Article 31 of the Marriage (Northern Ireland) Order 2003 already provided a basis for avoiding discrimination by allowing the appointment of a humanist celebrant without the need for it to be read and given effect in a way that was

compatible with the ECHR. The fact that the person solemnising the marriage was appointed pursuant to Article 31 of the 2003 Order (Registrars and other staff) rather than pursuant to Article 14 (Temporary authorisation to solemnise religious marriage) did not, in its view, give rise to any difference of treatment.

Accordingly, it allowed the Attorney's appeal, quashed the mandatory Order made by Colton J and set aside his declaration – *but otherwise agreed with his judgment.*

[Source: Northern Ireland Court of Appeal – 28 June]

Opposite-sex civil partnerships in England and Wales

For information

Section 1(1) of the Civil Partnership Act (CPA) 2004 defines a civil partnership as "a relationship between two people of the same sex … (a) which is formed when they register as civil partners of each other - (i) in England or Wales". With the coming into force of the Marriage (Same Sex Couples) Act 2013, same sex couples in England and Wales have had the choice between marriage or civil partnership – a choice denied to opposite sex couples. The Supreme Court has decided that this is discriminatory.

In *R (Steinfeld and Keidan) v Secretary of State for International Development* [2018] UKSC 32, five Justices of the Supreme Court unanimously allowed their appeal in a single judgment delivered by Lord Kerr. In short, the Court held that Parliament itself that brought about an inequality immediately on the coming into force of the Act, where none had previously existed and that "to create a situation of inequality and then ask for the indulgence of time - in this case, several years - as to how that inequality is to be cured is, to say the least, less obviously deserving of a margin of discretion".

The discrimination did not have a legitimate aim; and the Government should have ended the discrimination immediately, either by abolishing civil partnerships or by instantaneously extending them to different sex couples. Lord Kerr was equally dismissive of the Government's call for more time to consider the matter.

Comment: First, as Lord Kerr pointed out at [60], "a declaration of incompatibility does not oblige the government or Parliament to do anything". *Reports that the judgment means the instantaneous introduction of opposite sex civil partnership are therefore premature*.

Secondly, immediately following the judgment there was this exchange at Prime Minister's Questions:

> **Tim Loughton (East Worthing and Shoreham) (Con)**: "This morning the Supreme Court ruled that the Government had created inequality in not extending civil partnerships to everyone when they passed the equal marriage legislation back in 2013, and that discrimination needs to be addressed urgently. Will the Prime Minister now support an amendment to my Civil Partnerships, Marriages and Deaths (Registration Etc.) Bill when it goes into Committee next month, as the quickest way to resolve this illegal inequality and extend civil partnerships to everyone?"
>
> **The Prime Minister**: "We are very well aware of our legal obligations, and we will obviously need to consider the judgment of the Supreme Court with great care. We also recognise the sensitive and personal issues that are involved in this case, and we acknowledge the genuine convictions of the couple involved. My hon. Friend refers to his private Member's Bill. As he will know, we have committed to undertake a full review of the operation of civil partnerships. I know that there has been a lot of discussion with him about his Bill. We are supporting his private Member's Bill, which would enshrine that commitment in law."

Which looks very much like "wait and see".

[Source: BAILII – 28 June: CLAS summary]

FUNDING

Grants to tackle loneliness

For information and possibly for action

The Prime Minister has announced £20 million of new funding for charities and community groups to support and expand programmes that tackle loneliness and bring people together, including a new £11 million 'Building Connections Fund' which will help make the most of local spaces, opening them up for community use, and help businesses and local services combat isolation. It will also fund projects that use technology to link those in remote areas and help improve transport connections to make face-to-face contact easier.

It should be emphasised, however, that it is not all Government spending: it will be funded by £5 million from the Government, £5 million from the Big Lottery Fund, £1 million from the Co-op Foundation, £5 million from the People's Postcode Lottery and £4 million from the Health Lottery.

[Source: DCMS – 18 June]

NORTHERN IRELAND

CCNI: safeguarding good practice

For information

The Charity Commission for Northern Ireland recently hosted an *Essential safeguarding good practice seminar* aimed at ensuring that charities working with vulnerable beneficiaries overseas are aware of their responsibilities as charity trustees and the safeguarding standards expected of them. Following the event, the Commission has published the following resources from the seminar:

- Notes from the Commission's Essential Safeguarding Best Practice Seminar, 24 May 2018.
- Essential safeguarding practice seminar combined presentation: Download pptx (7.48 Mb)

[Source: CCNI – 19 June]

ODDS & ENDS

BT fined for data protection breach

For information

Another fine: this time, the Information Commissioner has fined British Telecommunications plc £77,000 after it sent nearly five million nuisance e-mails to customers. The ICO decided to issue BT pic with a monetary penalty under section 55A of the Data Protection Act 1998 for a serious contravention of Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR), which ban direct marketing e-mails without consent. Under the Regulations, they are only permitted where:

- the sender has obtained the contact details of the recipient of that electronic mail in the course of the sale or negotiations for the sale of a product or service to that recipient;
- the direct marketing is in respect of that person's similar products and services only; and
- the recipient has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of his contact details for the purposes of such direct marketing, at the time that the details were initially collected, and, where he did not initially refuse the use of the details, at the time of each subsequent communication.

The ICO received a complaint made by an individual who had alleged that he had received an unsolicited direct marketing e-mail from BT in December 2015 promoting their 'My Donate' platform, having previously opted-out of receiving direct marketing. There were two further e-mails promoting 'Giving Tuesday' and 'Stand Up To Cancer'. The Commissioner concluded that between 21 December 2015 and 29 November 2016, BT had sent 4,930,141 unsolicited direct marketing e-mails to individual subscribers contrary to regulation 22 of the PECR. The Commissioner concluded that the contravention was not deliberate but that it *was* negligent.

Comment: In all the publicity about the GDPR, it is very easy to overlook the Privacy and Electronic Communications (EC Directive) Regulations 2003, even though they have been on the statute book for fifteen years. The point to remember is that *direct marketing by e-mail requires active consent* – the GDPR justification of legitimate interest does not apply. The fact that BT was doing the direct marketing for "good causes" was neither here nor there, so *be very careful*.

[Source: Information Commissioner's Office – 27 June]

PROPERTY & PLANNING

Japanese knotweed

For information

The Court of Appeal has ruled that two householders in Wales were entitled to damages from Network Rail because it had failed to control Japanese knotweed on its land.

In *Network Rail Infrastructure Ltd v Williams & Anor* [2018] EWCA Civ 1514, the Court upheld the ruling of Cardiff County Court – though on rather different grounds – and concluded unanimously that there had been an unlawful interference with the claimants' enjoyment of the amenity of their properties because of the impairment of their right to use and enjoy those properties. It dismissed Network Rail's appeal.

Between them, *Churches own a lot of land* – and some of it no doubt is infected with Japanese knotweed. The judgment would repay careful study by property managers.

[Source: BAILII – 2 July]

MHCLG recommends minimum-term tenancies

For information and possibly for action

The Ministry of Housing, Communities and Local Government has launched a consultation on overcoming the barriers to longer tenancies in the private rented sector. Aiming to increase security for tenants in rented accommodation, the consultation puts forward a proposed model for a minimum three-year tenancy with a 6 month break clause. Responses to the consultation should be submitted online by **11:45 pm on 26 August 2018**.

It has been brought to the attention of CLAS that these proposals may well have a detrimental effect on certain Churches that let a vacant parsonage house when it is not required for a minister but where they need to retain the ability to make it available to an incoming minister as necessary. CLAS will certainly be responding to the consultation to highlight these

situations and would encourage any members who are affected by this or other issues to respond (and to share their response with us, in order to help us build a full picture of how these proposals will affect Churches).

In addition to the consultation, the Secretary of State for Housing, Communities and Local Government published a written ministerial statement regarding this update to housing policy. It included an announcement that the Local Authority Accelerated Construction programme will move into the delivery phase, with £450m being invested to accelerate the building of homes on surplus local authority land and to encourage the use of modern methods of construction and SME builders.

It was also announced that the Government would be creating a Community Housing Fund, which will allow community groups and local authority groups to apply for funding to bring forward community-led housing schemes to provide housing where the market is unable to do so.

[Source: MHCLG - 3 July]

SCOTLAND

Human Tissue (Authorisation) (Scotland) Bill

For information and possibly for action

The Health and Sport Committee of the Scottish Parliament has issued a call for written views on the Human Tissue (Authorisation) (Scotland) Bill, which was introduced by the Cabinet Secretary for Health and Sport on 8 June 2018.

The Bill contains proposals to introduce a system of 'deemed authorisation' for organ and tissue donation for transplantation (often known as 'presumed consent'). Proposals would ensure that, for someone who dies in circumstances where they potentially could become a donor and they have not made their wishes on donation known, they would be presumed to be a potential donor unless their next of kin provided information that the deceased person was against this. There is nothing in the Bill to allow the next of kin to prevent authorisation being deemed based on their own wishes.

An online survey has also been published. Both the call for views and the survey will be open until **4 September 2018**.

[Source: CLAS Summary - 28 June]

OSCR risk framework updated

For information

Hard on the heels of its updated guidance for trustees on fraud, OSCR has updated its risk framework. After a review, OSCR has reduced the number of risk areas from ten to six and adjusted some of the risk descriptions better to reflect the underlying issues and the regulatory action that it might take. You can read about the overall approach here. OSCR will be concentrating on the following areas:

- deliberate mismanagement of charities;

- criminal activity;
- charity trustees' lack of knowledge;
- attempts to gain charitable status for private benefit;
- lack of clarity of the charity brand - bodies at the margins of charitable status and/or with complex or novel structures; and
- charities that do not provide public benefit.

[Source: OSCR – 19 June]