

CLAS CIRCULAR 2009/15 (28 September 2009)

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CHARITIES & CHARITY LAW	2
Charitable Incorporated Organisations: progress on the consultation	2
Charities and political parties	2
Charity collaborations and mergers	3
Single-congregation LEPs	3
EMPLOYMENT	4
Compulsory retirement and the Equal Treatment Directive	4
National Minimum Wage, tips and service charges	4
Parental leave	5
Sick leave and the Working Time Directive	6
ENVIRONMENT	8
Ministerial responsibilities	8
FAITH & SOCIETY	9
Equality Bill	9
WATER	11
Surface water drainage: update	11
WALES	12
Historic environment	12

CHARITIES & CHARITY LAW

Charitable Incorporated Organisations: progress on the consultation

The Office of the Third Sector and the Charity Commission have published a joint [Summary of Consultation Responses and Next Steps](#) on the proposed Charitable Incorporated Organisation (CIO). The CIO will be an incorporated legal structure regulated by the Charity Commission alone, which will be designed to provide charity trustees with protections and responsibilities similar to those given to directors of limited companies without involving additional regulation by Companies House.

Responding to the consultation on how the CIO will work, the Government and the Charity Commission have agreed to make a number of changes to initial proposals including:

- ensuring a robust, fixed, duty of care – removing a proposal that CIO trustees could take less responsibility for their organisation's activities;
- tightening up rules on access to personal information in the registers of trustees and members that CIOs will have to maintain; and
- replacing a number of minor criminal offences for administrative failings with the power for the Charity Commission to direct rectification.

As to the minimum age for appointment as a trustee of a CIO, opinion was almost evenly divided between those who opted for 16 and those who opted for 18. The Government has decided to stick with its original proposal of 16 as the minimum age.

The aim is for the CIO to become an option for charities starting in late spring 2010 – though if previous experience is anything to go by, the timetable will very likely slip. Both new and existing charities will be able to consider becoming a CIO, although other existing forms of incorporation will also remain available.

[Source: *OTS News* – 17 September 2009]

Charities and political parties

The Charity Commission has published a [regulatory case report](#) which concludes that the Royal United Services Institute (RUSI), a registered charity, inadvertently breached the rules on party political activity. The issue came to light when the Electoral Commission referred to the Charity Commission the fact that Sir Menzies Campbell had used a donation to commission research from RUSI on the 'Military Covenant' – and the paper was then used for a Liberal Democrat party political paper, written by Sir Menzies and published on 26 September 2008. It is fairly unlikely that a church would fall into this trap, but the moral for any charity, whatever its charitable objects, is clear: *in dealings with political parties, be very, very careful.*

[Source: *Charity Commission News* – 15 September 2009]

Charity collaborations and mergers

The Charity Commission has published two new toolkits on collaborative working and merging – [Choosing to Collaborate](#) and [Making Mergers Work](#) – which may be of interest to some of the remaining small church charities. The publications are intended to give charities a framework within which to decide whether collaborative working or merging would help them and their beneficiaries. The Commission has also published new research on the work of its mergers unit, [Charity Mergers: Experiences from the Charity Commission](#), which highlights the details of the merger process, including the benefits and barriers.

[Source: *Charity Commission Press Release* - 18 September 2009]

Single-congregation LEPs

The Charity Commission has approved a standard governing document for Local Ecumenical Partnerships where two or more Churches have formed a single congregation. Existing LEPs do not need to change their constitution unless–

- they have an annual income normally greater than £100,000;
- they do not yet have an agreed constitution;
- their constitution needs amendment.

The necessary documents – [Information](#) needed for approval of an LEP, the [Approvals Form](#) to be completed as information and permissions are given, the [Model Constitution](#) for Single Congregation LEPs and an [Ecumenical Vision Statement](#) – can be downloaded as Word documents. Further information is available from the relevant CTE [webpage](#).

CTE is organising a [training event](#) for County or Denominational Ecumenical Officer and treasurers, secretaries and clergy of single-congregation LEPs with an annual income of over £100,000.

The event will take place on **Monday 12 October 2009** from 11.00 am to 3.30 pm at [Methodist Central Hall, Oldham Street, Manchester M1 1JQ](#) (0161 236 5194). Its purpose is–

- to guide participants through the process of application for charity registration;
- to explain the new Charity Commission-approved model constitution for single congregation LEPs; and
- to guide participants through the process of adopting the new constitution

It will include time for questions and the opportunity for one-to-one exploration of specific questions about individual situations. There will also be a separate session for Ecumenical Officers about the approvals process.

[Source *CT E-news* 15 September 2009]

EMPLOYMENT

Compulsory retirement and the Equal Treatment Directive

The Administrative Court has refused – for the moment – to declare compulsory retirement at 65 incompatible with the Equal Treatment Directive. Age Concern had challenged it on the grounds that the Employment Equality (Age) Regulations 2006 had not correctly transposed the Directive into United Kingdom law. However, when asked for an opinion, the European Court of Justice ruled that member states might treat people differently on grounds of age provided that differences in treatment were 'objectively and reasonably' justified by a legitimate aim, such as employment policy, or labour market or vocational training objectives. Initial media reaction was that Age Concern had 'lost' and that a compulsory retirement age of 65 was not in breach of EU legislation – which was not quite what the European Court had ruled.

Initial media speculation proved to be correct, however. When the case returned to the Administrative Court, Mr Justice Blake refused to overturn the Regulations on the following grounds:

- it was not for the Court to identify when a particular age for a designated retirement age (DRA) was justified;
- the age of 65 had some support from past practice in the United Kingdom and continuing practice elsewhere in the European Union;
- no-one had made a case for an alternative DRA; and
- the Government had to be allowed a degree of discretion in the selection of the age for a DRA and in monitoring its impact.

Regulation 30 of the Employment Equality (Age) Regulations 2006 was not, therefore, beyond the Government's competence or outside its discretionary area of judgment in applying the Directive.

However, it is clear from the [judgment](#) that the result would almost certainly have been different had not the Government already announced a review of the Regulations. The judge placed on the record the fact that he could not see how the age-limit of 65 could remain after that review. If, therefore, the review concludes that the age-limit of 65 *should* remain, we can expect another challenge in the courts.

[Source: *BAILLI* – 25 September 2009]

National Minimum Wage, tips and service charges

New rules come into force on **1 October** which outlaw the practice in the catering trade of using tips and gratuities to make up staff wages to the National Minimum Wage. In [Annabel's \(Berkeley Square\) Ltd & Ors v HM Revenue & Customs](#) [2009] EWCA Civ 361 (07

May 2009) the Court of Appeal held that the *tronc* system, under which discretionary tips, gratuities and service charges paid by customers to waiters and bar staff were scooped into a pool then used to top up pay, was illegal in England and Wales. New rules made as a result of the judgment in *Annabel's* will make this generally illegal across the United Kingdom.

According to HMRC's guidance, [Tips, Gratuities, Service Charges and Troncs](#), amounts paid by a customer as service charges, tips, gratuities and cover charges count towards NMW pay if:

- they are paid by the employer to the worker via the employer's payroll, and
- the amounts paid are shown on the payslips issued by the employer.

Such payments will also count towards National Minimum Wage pay where the troncmaster operates PAYE on *tronc* distributions and uses the employer to pass the net payments to each worker, *provided the amounts are paid to the worker through the employer's payroll and are reflected on the payslips issued by the employer.*

Tips given directly to the worker by the customer do not count towards the NMW, nor does money paid directly from a *tronc* to a worker. For NICs purposes, payments that count for NMW purposes can be payments in respect of gratuities and therefore not be liable to NICs.

Probably the majority of church charities which have restaurants or cafés for staff or visitors run their catering either by contracting it to a commercial caterer or by handing over its running to a company wholly owned by the church or charity in question. However, those that run their catering as an in-house operation need to make sure that their remuneration practices are compliant with the new rules, while those that operate through a charitable company still need to make sure that the charitable company's practices are compliant.

[Source: *Legislation Monitoring Service for Charities Summary* – 26 September 2009]

Parental leave

The Government has announced that it is to consult on more flexible arrangements for parental leave. This new provision will be available during the second six months of the child's life and would be an option if the mother has maternity leave outstanding. The intention is that mothers will be able to choose to transfer the last six months of their maternity leave to the father, with three months paid. Under the new scheme:

- Families will have the choice to transfer up to six months leave to the father should they want to, which can be taken by the father once the mother has returned to work;
- This new provision will be available during the second six months of the child's life, giving parents the option of dividing a period of paid leave entitlement between them

- Some of the leave may be paid if taken during the mother's 39 week maternity pay period. This would be paid at the same rate as Statutory Maternity Pay (currently £123.06);
- Parents will be required to self-certify by providing details of their eligibility to their employer. Employers and HMRC will both be able to carry out further checks of entitlement if necessary.

In order to give employers time to adjust it will be introduced for parents of children due on or after 3 April 2011. Estimated take-up of Additional Paternity Leave is less than 6 per cent and it is estimated that take up will affect 0.7 per cent, or 1 in every 137, of all small businesses.

HMRC has published [guidance](#) on the likely impact on employers. The earliest cases of Additional Paternity Leave and Pay [APL&P] are likely to arise, in highly exceptional circumstances, during 2010/11 – where a baby due in April 2011 is born prematurely, the mother dies in childbirth and the father takes APL&P early. This could happen from November 2010. The number of such cases is likely to be very small. APL&P will arise in more normal circumstances from 2011/12.

[Source: *BIS News* – 15 September 2009]

Sick leave and the Working Time Directive

In what is likely to prove a landmark judgment, [Vicente Pereda v Madrid Movilidad SA](#), the European Court of Justice has held that workers who fall ill during their holidays may claim the time back from their employers. Mr Pereda, a driver for Madrid Movilidad SA, had an accident at work in July 2007 which meant that he was on sick leave for all but two days of his allocated summer holiday. When he asked for more paid annual leave for 2007 to make up for this, his employers rejected his request without giving any reasons and he took the matter to the local employment court.

Article 7 of Directive 2003/88 (the Working Time Directive) provides that

Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.

The court, unsure of the correct interpretation of Article 7 of the Directive, sought a preliminary ruling from the ECJ – which ruled as follows:

Article 7(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as precluding national provisions or collective agreements which provide that a worker who is on sick leave during a period of annual leave scheduled

in the annual leave planning schedule of the undertaking which employs him does not have the right, after his recovery, to take his annual leave at a time other than that originally scheduled, if necessary outside the corresponding reference period.

The ECJ judgment in this case has already caused considerable disquiet among employers who are fearful that the controls in the United Kingdom's system of self-certification of sick leave will prove inadequate in the new situation. The *Daily Telegraph* reported that Katja Hall, Director of HR Policy at the CBI, had described the ruling as a concern and had commented that 'Many firms already take a common sense and sympathetic approach. But allowing employees to re-classify their holiday as sick leave opens the door to abuse'.

The possible impact of *Pereda* on the churches is potentially quite considerable. It will obviously apply to employees – clergy or lay – with contracts of employment. Its effect on the position of office-holder clergy without contracts, such as Church of England incumbents with freehold, is more difficult to estimate. But it might be as well to assume that, in time, it will be extended to apply to them as well.

[Source: *BAILII* – 10 September 2009]

ENVIRONMENT

Ministerial responsibilities

Margaret Hodge has returned to DCMS after compassionate leave as Minister for Culture, Creative Industries & Tourism with responsibility, *inter alia*, for heritage, arts and tourism – all three of which engage the interests of CLAS to some degree.

Barbara Follett has been appointed as a Parliamentary Under-Secretary of State at DCLG to replace Sarah McCarthy-Fry, who moved to the Treasury in June. Her responsibilities within the DCLG brief (and, presumably, any reallocation of responsibilities among the other members of the ministerial team) have yet to be announced.

FAITH & SOCIETY

Equality Bill

Readers will recall that the [Equality Bill](#) has now completed its committee stage in the Commons and that William Fittall (Church of England) and Richard Kornicki (Catholic Bishops' Conference of England & Wales) gave evidence to the committee in which they argued that the exceptions for religion or belief currently in the Bill give considerably less protection to religion and belief than do the Employment Equality (Religion or Belief) Regulations 2003 (SI/2003/1660) which the Bill revokes. In particular, there remains the issue of the employment exemption in Schedule 9, as follows [bold type added]:

Religious requirements relating to sex, marriage etc., sexual orientation

...(5) The application of a requirement engages the compliance principle if the application is a proportionate means of complying with the doctrines of the religion.

(6) The application of a requirement engages the non-conflict principle if, because of the nature or context of the employment, the application is a **proportionate** means of avoiding conflict with the strongly held religious convictions of a significant number of the religion's followers.

(7) A reference to employment includes a reference to an appointment to a personal or public office.

(8) **Employment is for the purposes of an organised religion only if the employment wholly or mainly involves—**

(a) leading or assisting in the observation of liturgical or ritualistic practices of the religion, or

(b) promoting or explaining the doctrine of the religion (whether to followers of the religion or to others)...

The Secretary attended an inter-faith meeting on 17 September (which included representatives of several Christian denominations and of the United Synagogue, as well as delegates from the Hindu, Muslim, Sikh and Jain communities) at which concern was expressed about the words in bold in Schedule 9. The Government, however, argues that this simply states the current law in the light of the ruling in *Reaney v Hereford Diocesan Board of Finance* [2007] Employment Tribunal No 1602844/2006.

We understand that officials working on the Bill have asked for specific examples where the proposed wording in Schedule 9 would cause difficulties for faith-communities. *If you have such an example from your own church, please write to:* Jonathan Rees, Director General, Government Equalities Office, 9th Floor, Eland House, Bressenden Place, London SW1E 5DU. But please note that **this exercise only relates to 'employment for the purposes of religion'** where gender, being a transsexual, marital status or sexual orientation would be an

issue in a post other than one primarily concerned with leading worship or formally promoting doctrine.

A letter is also being drafted by the various religious groups which will be sent to Ministers. CLAS has no brief to represent its members on this matter and is not, therefore, participating in this particular exercise; if, however, any member organisation wishes to do so individually the contact is Nick Grant, at Devonshires Solicitors, Salisbury House, London Wall, London EC2M 5QY: e-mail Nick.Grant@devonshires.co.uk.

WATER

Surface water drainage: update

At the Labour Party Conference today, 28 September, Environment Secretary Hilary Benn has announced that the Government will legislate to allow water companies to introduce a social tariff in their areas – thereby bypassing Ofwat. The Press Office quotes him as follows:

Some churches, sports clubs and youth groups have been hit by huge increases in their water bills for surface drainage. It isn't right. So I can tell you today that we will legislate to allow water companies to run concessionary schemes for these organisations so they can get on with the great job they are doing instead of worrying about unaffordable bills.

Presumably this will be done through the Flood and Water Management Bill which is currently in draft and which (we assume) will be taken through Parliament in the forthcoming Session.

The announcement has been welcomed by the Church of England and will no doubt be greeted with relief by all our members. General Synod member Martin Dales, who has been very active in the DontDrainUs campaign, called the announcement 'very good news' and said that Synod looked forward to the implementation of what had been promised. So do we – and we will be following developments closely and continuing to work with other groups in the sector to ensure that any schemes that are introduced are fairly implemented.

[Source: CLAS – 28 September 2009]

WALES

Historic environment

On 22 September, the Heritage Minister, Alun Ffred Jones AM, published his Strategic Direction Statement for the Historic Environment of Wales and made an oral statement to the Welsh Assembly. The following "key actions" may be of interest:

- Cadw will carry out a new survey to identify 20th century assets of historic importance;
- Cadw will take measures to develop "a modern, clear, accountable system of heritage protection with up to date guidance". To ensure an ongoing dialogue with all sector interests, a further Treftadaeth conference will be convened in July 2010;
- there will be continued collaboration on the sustainable regeneration of heritage sites and townscapes;
- there will be collaborative action to tackle access barriers to heritage and, through Cadw, develop an all-Wales Heritage Interpretation Plan; and
- the Minister will convene a Heritage Summit in 2010 to discuss heritage interpretation and the links between heritage and the arts.

[Source: *Welsh Assembly Record of Proceedings* – 22 September 2009]