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PARLIAMENTARY REPORT

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Frank Cranmer
Fellow, St Chad's College, Durham
Honorary Research Fellow, Centre for Law and Religion, Cardiff University

CHARITY LAW

England and Wales

As predicted, the Charities Act 2011,[1] which consolidates the Recreational Charities Act 1958, the Charities Act 1993 and many of the provisions of the Charities Act 2006, received Royal Assent on 14 December and came into force on 14 March 2012, three months after its enactment.

The Charity Commission's promised guidance on public benefit and specific beneficiary groups did not appear, presumably because the outcome of the latest appeal by the charity Catholic Care had not yet appeared. However, as the Upper Tribunal directed in its judgment in *The Independent Schools Council v The Charity Commission*,[2] the Commission withdrew those aspects of its public benefit guidance that required rewriting to ensure consistency with the Upper Tribunal's decision – and announced in late December that it did not intend to appeal against the judgment.[3] Though most of the rest of the guidance still stands, the whole of the document on 'Public benefit and fee charging' has been withdrawn. The intention was to produce a draft by the end of March 2012 for a three-month public consultation, with final publication in summer 2012.

In October the Charity Commission published updated guidance on charities and investment matters, which made it clear that charity trustees are permitted to invest their funds ethically and sustainably, to provide a financial return or, crucially, in order to achieve their charitable objects – or for a mix of all or any of these. The guidance does, however, make it clear that before committing funds to a mixed-motive investment trustees need to be satisfied that the investment can be justified by the combination of the anticipated return and the contribution of the investment to the charity's objects.

1 Available at <http://www.legislation.gov.uk/ukpga/2011/25/enacted>, accessed 28 December 2011.
2 [2011] UKUT 421 (TCC) (13 October 2011), available at <http://www.bailii.org/uk/cases/UKUT/TCC/2011/421.pdf>, accessed 28 December 2011.
3 T Mason, 'Charity Commission will not appeal schools judgment', *Third Sector Online*, 3 January 2012.

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Finally, at the eleventh hour before the 8 November deadline, the Minister for Civil Society, Nick Hurd, announced that the five-year review of the Charities Act 2006 mandated by section 73 would be led by the President of the National Council for Voluntary Organisations, Lord Hodgson of Astley Abbotts, who had previously led the Government's Red Tape Task Force that considered regulatory barriers affecting charities, voluntary organisations and social enterprises. He will consider two main issues: the operation and effectiveness of the Act and whether further changes could be made to improve the legal and regulatory framework. The intention is that he will report to Parliament by summer 2012. Among the specific issues to be examined are the implications of the two different definitions of 'charity' in the 2006 Act[4] and the advisability or otherwise of implementing Recommendation 5.2 of the Calman Commission[5] for a single statutory definition of 'charity' and 'charitable purpose(s)' applicable throughout the United Kingdom.

If at this point you are wondering why the review of the 2006 Act was not conducted in advance of the consolidation rather than subsequent to it, you are not alone.

Scotland

Though the Charities and Trustee Investment (Scotland) Act 2005 introduced a new regime that allowed charities to modernise and update their governance where they did not already have the power to do so, it did not allow a charity to amend the governance of any restricted funds that it holds.[6] The Scottish Government therefore opened a consultation on the draft Charities (Scheme for the Transfer of Assets) (Scotland) Regulations and the draft Charities Restricted Fund Reorganisations (Scotland) Regulations, which, together, will bring fully into force those parts of the 2005 Act that give the Office of the Scottish Charity Regulator (OSCR) further regulatory powers over charitable assets or, in the case of reorganisation of restricted funds, allow the OSCR to approve schemes designed to unlock unused charitable assets. Neither of those parts of the 2005 Act imposes new requirements on charities themselves.

Northern Ireland

Though the uncertainties surrounding the drafting of the Charities Act (Northern Ireland) 2008 remain unresolved, the Charity Commission for Northern Ireland has decided to assume powers to make *cy-près* schemes in

4 Which now appear as ss 2 and 11 of the 2011 Act. The definition of 'charitable purpose' in s 2 is of general application; the definition in s 11 has a much more limited application. There were attempts to change this as the 2011 Act was going through Parliament, but Lords and Commons Standing Orders provide that a consolidation bill cannot make substantive changes to legislation.

5 Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21st century* (Edinburgh, 2009).

6 'Restricted funds' are property (including money) given to a charity for a specific purpose and with conditions on its use.

accordance with sections 26 to 30 of the Act and has initiated an advance notification exercise in order to gain an overall idea of how many applications it is likely to receive. Under the current law, *cy-près* schemes for trusts of over £50,000 can only be granted by the High Court; the new arrangements are intended to avoid the expense of High Court proceedings for larger trusts.

As to the general issue of making good the deficiencies in the Act, a recent inquiry to the Northern Ireland Assembly elicited the response that an amending Bill was unlikely before the very end of 2012 at the earliest.[7]

CIVIL PARTNERSHIP AND RELIGIOUS PREMISES

England and Wales

As noted previously,[8] section 202 of the Equality Act 2010, which amended the Civil Partnership Act 2004 in respect of England and Wales to give the Secretary of State power to approve the registration of civil partnerships on religious premises, included a proviso that 'For the avoidance of doubt, nothing in this Act places an obligation on religious organisations to host civil partnerships if they do not wish to do so'. Nevertheless, serious misgivings were expressed about the effectiveness of that wording;[9] and when the Marriages and Civil Partnerships (Approved Premises) (Amendment) Regulations 2011,[10] which came into effect on 5 December, were laid before Parliament they were opposed in the Lords by Baroness O'Cathain, who claimed that they did not fulfil the Government's pledge to protect faith groups from being compelled to register civil partnerships against their will. After an assurance by the Minister of State at the Home Office, Lord Henley, that 'if a successful legal challenge were ever brought … the Government would immediately review the relevant legislation',[11] Lady O'Cathain withdrew her opposition.

CONSTITUTIONAL AFFAIRS

The West Lothian question

As noted in the previous issue,[12] the Government decided to establish an independent, non-partisan Commission on the West Lothian question, to examine

7 Personal communication from the Clerk of Bills, Northern Ireland Assembly.
8 (2012) 14 Ecc LJ 95.
9 Not least by the Editor of this *Journal* in an Opinion for the Christian Institute, which was subsequently published by the House of Lords Merits of Statutory Instruments Committee: see <http://www.parliament.uk/documents/lords-committees/merits-statutory-instruments/Professor-Mark-Hill-QC-Legal-Opinion-to-Merits-Committee-on-Marriages-and-Civil-Partnerships-%28Approved-Premises%29-%28Amendment%29-Regulations%202011.pdf>, accessed 30 December 2011.
10 Available at <http://www.legislation.gov.uk/uksi/2011/2661/contents/made>, accessed 30 December 2011. They were subject to the negative procedure.
11 HL Deb 15 December 2011 c 1445.
12 (2012) 14 Ecc LJ 97–98.

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how Parliament as a whole might deal most effectively with business wholly or primarily affecting England. On 17 January 2012 the Cabinet Office announced its membership: it will be chaired by Sir William McKay, former Clerk of the House of Commons, and will include the retiring First Parliamentary Counsel, Sir Stephen Laws, and his immediate predecessor, Sir Geoffrey Bowman, Sir Emyr Jones Parry, who chaired the Convention on the law-making powers of the Welsh Assembly, and Professors Charlie Jeffery of Edinburgh University and Yvonne Galligan of Queen's University, Belfast. Notable by its absence is any party-political representation.

The review was promptly opposed by the Labour Party's shadow Scottish secretary, Margaret Curran, who argued that it would 'create second-class MPs based on what part of the UK they come from', while the Institute for Public Policy Research criticised it on the grounds that looking at a very narrow technical issue 'simply isn't sufficient to address the much broader debate which is needed about England's place in the union, and about the way England is governed'.[13]

LISTED PLACES OF WORSHIP GRANT SCHEME

On 14 October it was announced on the Listed Places of Worship Grant Scheme website that the payable rate for claims for the first and second quarters of 2011/2012 would be 71.7261%.[14] The breakdown of the October payments (released under the Freedom of Information Act) reveals that during the period 1 April to 30 September 2011 the Scheme received 1,577 applications, of which 1,218 were agreed to be eligible. The total of eligible claims was £4,826,568.16 and, after administration charges, the amount paid out was £3,461,913.71, or some 72% of eligible claims. The shortfall of claims against payments was therefore £1.36 million.

OFFENSIVE BEHAVIOUR AND THREATENING COMMUNICATIONS (SCOTLAND) ACT 2012

The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012,[15] which came into force on 1 March, creates two new statutory offences: expressing or inciting religious, racial or other forms of hatred likely to cause public disorder at or on the way to a 'regulated football match', and communicating material threating serious harm – including material

13 Severin Carrell, 'West Lothian question inquiry "risks creating second-class MPs"', *The Guardian*, 17 January 2012.
14 See <http://www.lpwscheme.org.uk/prorata_percentage.htm>, accessed 17 February 2012.
15 Available at <http://www.legislation.gov.uk/asp/2012/1/contents/enacted>, accessed 25 January 2012.

intended to incite religious hatred – whether sent by mail or posted on the Internet. Section 7 (Protection of freedom of expression), however, provides that the provision in section 6 regarding threatening communications intended 'to stir up hatred on religious grounds' shall not apply to 'discussion or criticism of religions or the beliefs or practices of adherents of religions, expressions of antipathy, dislike, ridicule, insult or abuse towards those matters, proselytising, or urging of adherents of religions to cease practising their religions'.

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