

## PARLIAMENTARY REPORT

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### June–September 2016

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#### 'BREXIT MEANS BREXIT'

Much ink has been spilt and countless electrons agitated over the outcome of the EU Referendum. The Prime Minister, Theresa May, has pronounced that 'Brexit means Brexit'. In a speech to the Conservative Party Conference in October 2016 she indicated a timetable for repeal of the European Communities Act 1972 and the triggering of Article 50 in the spring of 2017.

One likely outcome of that stance is that when the UK leaves the European Union it will become much more difficult for EU citizens to come to the UK to undertake voluntary work for churches and charities. On 13 September the Department for Exiting the European Union answered a Written Question on the matter in very stark terms:

The Prime Minister has been clear that free movement cannot continue as it has in the past and one of the opportunities of Brexit is that we will be able to control the number of people coming to Britain from the EU. The precise way in which the Government will control the movement of EU nationals, including volunteers, is yet to be determined. We will be considering all options available to us based on the best available evidence.<sup>1</sup>

#### A BRITISH BILL OF RIGHTS?

During the period under review, the controversy about replacing the Human Rights Act 1998 with a 'British Bill of Rights' continued to rumble on. As noted in the May–September report, the Queen's Speech on 18 May included an undertaking that there would be a further round of consultation on the proposal. In her first appearance before the House of Commons Justice Committee,

<sup>1</sup> HC Deb, Written Answers, 13 September 2016.

the new Lord Chancellor and Secretary of State for Justice, Elizabeth Truss, confirmed that the Government had not abandoned its plans to repeal the Human Rights Act but that it did intend to remain a signatory to the ECHR.<sup>2</sup> When asked what the proposal was designed to achieve, she replied:

We were members of the Convention before the Human Rights Act. The Human Rights Act is a fairly recent phenomenon . . . The British Bill of Rights will protect our rights but in a better way. That is fundamentally what we are saying. There have been problems with the Human Rights Act . . . The problems have emerged since the Human Rights Act came in.<sup>3</sup>

Significantly, however, she did not rule out putting an end to the right of individuals to plead Convention rights in the UK courts.<sup>4</sup>

#### CHARITY COMMISSION: GUIDANCE FOR TRUSTEES ON TAKING LEGAL ACTION

The Charity Commission published new guidance for trustees about when to take or defend legal action, ‘Charities and litigation: a guide for trustees’ (CC38), in consultation with the Charity Law Association. In its recent newsletter for trustees, the Commission noted that litigation could present a significant risk to a charity and that the decision whether or not to litigate had to be made in the best interests of the charity and balanced against the risks and consequences that any legal action could bring. The Commission expected trustees to be able to show that they had applied the principles of the guidance when their charity was involved in litigation; decisions on whether or not to take or defend legal action should be made in accordance with the principles set out in the Commission’s existing guidance, ‘It’s your decision: charity trustees and decision making’ (CC27).

In applying those principles to decisions about litigation, trustees had to take and consider legal advice, assess the economic prospects of success or failure and the impact on the charity, and consider whether their intended actions were proportionate in all the circumstances and in the best interests of the charity. The Commission expected trustees to consider legal action only after they had explored and, where appropriate, ruled out any alternatives for resolving the dispute.

2 HC 620, 7 September 2016, Justice Committee, Oral evidence, ‘The work of the Secretary of State’, QQ 81–82.

3 Ibid, Q 84.

4 Ibid, Q 85.

## CHARITY COMMISSION: REPORTING AND ACCOUNTING TEMPLATES

The Commission published a series of templates to help non-company charities with incomes below £500,000 to prepare their trustees' annual reports and accruals accounts in accordance with Charities SORP FRS 102:

- i. Charity accounting templates: accruals accounts (CC17) – SORP FRS 102;
- ii. Trustees' annual report template (SORP FRS 102); and
- iii. Independent examiner's report template (SORP FRS 102).

The new templates are to be used for reporting periods beginning on or after 1 January 2015.

The Commission encourages charities using the new templates to convert their accounts to PDF files and to submit them by e-mail rather than in hard copy.

## CHARITIES (PROTECTION AND SOCIAL INVESTMENT) ACT 2016

The Charities (Protection and Social Investment) Act 2016 received Royal Assent on 16 March 2016 and at the time of writing most of its provisions had come into force. What was still outstanding, however, was the power under section 1 for the Charity Commission to issue an official warning to a charity or to its trustees where it considers that there has been a breach of trust or duty or other misconduct or mismanagement. On 1 July, the Commission issued a consultation paper on the exercise of its powers under section 1; the consultation closed on 22 September.

## CHARITY LAW: LAW COMMISSION CONSULTATION

The Law Commission launched a supplementary consultation as part of its project examining practical aspects of charity law, considering two technical questions on charity purposes and trust corporation status that arose from the Commission's original consultation in 2015.

Under the current legislation it is significantly more complicated for an unincorporated charity to change its purposes than for an incorporated charity or charitable incorporated organisation (CIO). The Commission is proposing that it be possible for unincorporated charities to do so without the need for a scheme or a *'cy-près* occasion' and with the consent of the Charity Commission according to 'similarity considerations', which are that the new purpose be:

- i. In the spirit of the original gift;
- ii. Applied for charitable purposes that are close to the original purposes; and

- iii. Suitable and effective in the light of current social and economic circumstances.

The intention is also that Charity Commission consent for incorporated charities wanting to change their purposes be given according to the same considerations.

At present, the complex nature of obtaining trust corporation status for a charity can present a significant barrier to doing so. However, trust corporation status can often be beneficial for the charity, particularly when dealing with land held as permanent endowment or when applying for a grant of probate. The Law Commission is therefore proposing to simplify the procedure for obtaining trust corporation status by allowing any charitable company or CIO to do so by resolution of the charity trustees. It is also asking whether the status should be available more widely or automatically.

The consultation closed on 31 October 2016.

## CREMATION LAW

In July, the UK Government published its response to the consultation on infant cremations, which sought views on proposals for changes to the Cremation (England and Wales) Regulations 2008 and for improving other aspects of cremation practice. The Government had consulted between December 2015 and March 2016 following consideration of David Jenkins' report of June 2015 into infant cremations at Emstrey Crematorium and Lord Bonyon's Scottish Infant Cremation Commission report of June 2014.

Following consideration of the responses, the Government planned to make the following changes:

- i. To introduce a statutory definition of ashes;
- ii. To amend statutory cremation forms to make sure that applicants' wishes in relation to recovered ashes are explicit and clearly recorded before a cremation takes place;
- iii. Where parents choose a cremation following a pregnancy loss of a foetus of less than 24 weeks' gestation, to bring such cremations into the scope of the regulations, like all other cremations; and
- iv. To establish a national cremation working group to advise on a number of technical matters.

The Government emphasised that there were no plans to alter parents' current choices following a miscarriage at under 24 weeks' pregnancy: cremation, burial, sensitive incineration or asking the hospital to make arrangements on their behalf.

The Cremation (England and Wales) (Amendment) Regulations 2016 duly came into effect on 1 October 2016: they introduce a statutory definition of ashes and they remove the requirement that cremation authorities must keep original paper records for two years even though they have also made electronic copies of those records. The Government also announced the establishment of the National Cremation Working Group of representatives from the cremation and funeral industries, voluntary organisations that support bereaved parents, medical professionals and other Government departments with an interest in cremation. Its first priority will be amending statutory application forms regarding options for disposal of ashes and bringing the cremation of foetuses of less than 24 weeks' gestation into the remit of the Cremation Regulations.

In July, the Scottish Government announced its response to the recommendations of the National Cremation Investigation Report by Dame Elish Angiolini QC, the former Lord Advocate, which was published on 17 June. Ministers accepted Dame Elish's recommendations in full.

#### GIFT AID SMALL DONATIONS SCHEME

The Queen's Speech included an announcement that the Government would bring forward a bill to simplify the Gift Aid Small Donations Scheme (GASDS), from which the churches collectively are probably the major beneficiaries. The Small Charitable Donations and Childcare Payments Bill 2016–17 and the accompanying Explanatory Notes were duly published on 14 September 2016. The Bill, which started in the House of Commons, amends the payment schemes established by the Small Charitable Donations Act 2012 and the Childcare Payments Act 2014.

In short, the GASDS provisions of the Bill put in place the changes announced in the Government's response to its most recent consultation reviewing the Scheme. The amendments to the 2014 Act:

- i. Will abolish the two-year eligibility rule and the Gift Aid history requirement (the 'two-in-four' rule) to allow smaller and newer charities to benefit from the Scheme sooner (Clause 1);
- ii. Will allow contactless donations to be eligible under the Scheme from 6 April 2017 (Clause 2);
- iii. Will simplify the rules specifying the total top-up payment that charities are entitled to claim;
- iv. Will provide that charities or a group of charities may claim under the main allowance or under the community buildings allowance, *but not under both* (which means that, where there are connected charities, it will no longer be possible for one of them to claim under the main allowance and another to claim under the community buildings provisions) (Clause 3); and

- v. Will reform the community buildings rules so that donations received outside the community building but within the same local authority area will qualify under the Scheme.

Currently, the total Gift Aid donations must be at least 10 per cent of the amount of the small donations on which top-up payments are claimed for that tax year. The Bill does not change that requirement.

## INDEPENDENT INQUIRY INTO CHILD SEXUAL ABUSE

During the period under consideration, Dame Lowell Goddard resigned as Chair of the Independent Inquiry into Child Sexual Abuse and returned to New Zealand. She was replaced by Professor Alexis Jay, the fourth person to chair the Inquiry since it was established in July 2014. In a leaked memorandum to the Commons Home Affairs Committee, Dame Lowell argued that the Inquiry was under-funded to meet the scale of the tasks assigned to it and that she had recommended to the Home Secretary that the scope of the inquiry be reviewed, with a view to scaling it back.

Professor Jay issued a statement in which she confirmed that the review panel would not be seeking any revision of the Inquiry's terms of reference or introducing any new restrictions on its scope. She had, however, initiated an internal review of the Inquiry's ways of working and was looking at different approaches to evaluating the information received. She followed that up with a letter to Core Participants in which she reiterated her earlier statement and sought to rebut the charge that too many of the Inquiry's staff had come from the Home Office.<sup>5</sup>

That was not the end of the story, however: on 28 September 2016 it was announced that the senior member of the Inquiry's legal team, Ben Emmerson QC of Matrix Chambers, had been suspended from duty; on the following day he resigned. At the same time, it emerged that that Elizabeth Prochaska, Emmerson's immediate deputy, had already resigned with effect from 15 September. Further comment is superfluous.

## NORTHERN IRELAND AND ECCLESIASTICAL EXEMPTION

At the end of September 2016, it was announced that the ecclesiastical exemption from listed building control in Northern Ireland is, after all, to be retained. There were 122 responses to the consultation on the proposal to abolish it: perhaps unsurprisingly, there was strong opposition from the churches to the removal of the exemption, while the district councils and groups concerned

<sup>5</sup> In Scotland, Susan O'Brien QC resigned as Chair of the Scottish Child Abuse Inquiry, together with one of the other panel members, Professor Michael Lamb. Lady Smith, a judge of the Court of Session, replaced Ms O'Brien on 1 August.

with protecting the historic environment supported the proposed extension of listed building controls.

Instead, the Minister, Mark Givan MLA, has proposed ‘close engagement’ between his civil servants, district council officials and the churches to ‘support effective decision making as regards changes to places of worship’. For larger organisations, the Department for Communities will put in place partnering arrangements, governed by a memorandum of understanding or similar, which will enable structured engagement with governing bodies at a Northern Ireland level. For smaller organisations and individual self-governing places of worship it will provide additional guidance on changes to places of worship.<sup>6</sup>

#### SAFEGUARDING AND CLERGY DISCIPLINE MEASURE 2016 (COMMENCEMENT NO. 2) ORDER 2016

On 1 October 2016, the Safeguarding and Clergy Discipline Measure 2016 (Commencement No. 2) Order 2016 brought into force sections 5 and 6 of the Safeguarding and Clergy Discipline Measure 2016.

Under section 5, a ‘relevant person’ must have due regard to guidance issued by the House of Bishops on matters relating to the safeguarding of children and vulnerable adults. Section 6 defines a ‘child’ as a person aged under 18 and a ‘vulnerable adult’ as a person aged 18 or over whose ability to protect himself or herself from violence, abuse, neglect or exploitation is significantly impaired through physical or mental disability or illness, old age, emotional fragility or distress, or otherwise.

#### SCHOOL WORSHIP AND THE UN COMMITTEE ON THE RIGHTS OF THE CHILD

In June, the UN Committee on the Rights of the Child published its ‘Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland’.<sup>7</sup> One of its recommendations is on compulsory religious worship in state schools:

##### **Freedom of thought, conscience and religion**

The Committee is concerned that pupils are required by law to take part in a daily religious worship which is ‘wholly or mainly of a broadly Christian character’ in publicly funded schools in England and Wales, and that children do not have the right to withdraw from such worship without parental

6 Department for Communities, ‘Givan retains ecclesiastical exemption’, 29 September 2016, <<https://www.communities-ni.gov.uk/news/givan-retains-ecclesiastical-exemption>>, accessed 29 September 2016.

7 Available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/149/88/PDF/G1614988.pdf?OpenElement>>, accessed 18 September.

permission before entering the sixth form. In Northern Ireland and Scotland, children do not have right to withdraw from collective worship without parental permission.

The Committee recommends that the State party repeal legal provisions for compulsory attendance at collective worship in publicly funded schools and ensure that children can independently exercise the right to withdraw from religious worship at school.

The Government has not yet responded. However, at the close of the period under review Lord Pentland, sitting in the Outer House of the Court of Session, approved the initial draft of an application by Humanist Society Scotland for judicial review of the provision in the Education (Scotland) Act 1980 under which pupils aged 16 and above have no right to opt out of religious observance. At the time of writing, it was to be remitted to the Scottish Government for a response.

#### OFFICE OF THE SCOTTISH CHARITY REGULATOR

The Office of the Scottish Charity Regulator (OSCR) announced that, given various complications in the process of becoming a Scottish Charitable Incorporated Organisation (SCIO) – both for charities and for the OSCR itself – it was abolishing one of the incorporation processes in an attempt at simplification. From early November 2016, charities that wish to incorporate have been required to apply for registration as a new charity and seek consent to wind up the existing charity. As a result, a charity seeking incorporation is now required to change its name and number as part of the process; however, the OSCR does not consider that this is too onerous a burden. OSCR intends to release full guidance on the new process for becoming an SCIO by early 2017, with interim guidance to be released in the meantime.

The OSCR also published new guidance for social enterprises that are considering becoming charities. It addresses some of the questions that applicants have about becoming a charity and some of the issues that OSCR encounters in applications for charitable status from social enterprises.

Finally, OSCR published 'A brief guide to grant giving', setting out the key points that grant-giving charities need to consider to make sure that they comply with the terms of the Charities and Trustee Investment (Scotland) Act 2005.<sup>8</sup> It covers allocations criteria, assessing applications and monitoring to ensure that the grant is used only for the purposes for which it was given.

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8 Available at <[http://www.oscr.org.uk/media/2282/v10\\_a-brief-guide-to-grant-giving\\_pdf.pdf](http://www.oscr.org.uk/media/2282/v10_a-brief-guide-to-grant-giving_pdf.pdf)>, accessed 12 October 2016.