

PARLIAMENTARY REPORT

October 2009–January 2010

FRANK CRANMER

Fellow, St Chad's College, Durham

Honorary Research Fellow, Centre for Law and Religion, Cardiff University

CHARITY LAW

United Kingdom

In April 2009 the International Accounting Standards Board published amendments to a number of International Financial Reporting Standards. As a result, in December 2009 the Accounting Standards Board (ASB) issued a new Financial Reporting Standard¹ which will ultimately flow through into SORP: the *Statement of Recommended Practice, Accounting and Reporting by Charities* which caused so much grief to treasurers of small charities when first introduced in the 1990s. At the time of writing, the Charity Commission and the Office of the Scottish Charity Regulator were holding a series of regional seminars on the future of charity reporting and accounting in light of the ASB's proposals.

England and Wales

To coincide with National Inter Faith Week, in November 2009 the Charity Commission published a new guide to governance for faith-based charities, *Faith in Good Governance*,² aimed predominantly at smaller or newer charities whose main focus is religious worship and related activities and covering issues such as registration, the definition of a religious charity for the purposes of charity law, approved governing documents and general issues of governance and trusteeship. The guidance may possibly reflect a feeling within the Commission that religious charities outside the mainstream lack reliable internal sources of legal advice.

The Charitable Incorporated Organisation (CIO) was proposed as a third model of incorporation for charities, with some of the features of a limited

1 *Improvements to Financial Reporting Standards 2009*, available at <<http://www.frc.org.uk/images/uploaded/documents/FRS%20Web%20Optimized1.pdf>> accessed 3 January 2009.

2 Available at <<http://www.charity-commission.gov.uk/Library/tcc/pdfs/faithgov.pdf>> accessed 3 January 2010.

company but regulated by the Charity Commission rather than under the Companies Acts. Progress has been painfully slow, however; and in October 2009 the Office of the Third Sector announced that the necessary regulations would not be approved until some time during the first quarter of 2010. The latest information is that the CIO will not become available as an option for charities until the beginning of 2011.

Finally, readers may recall that in January 2009 the Charity Commission held a consultation on its draft guidance on public benefit and the advancement of moral or ethical belief systems. The exposure draft attracted a good deal of criticism at the time; and though the Commission published a summary of responses to the consultation document,³ it has decided not to take the matter any further and will not be publishing guidance after all.⁴

Ireland

The Charity Commission for Northern Ireland's consultation document, *Meeting the Charity Test – Demonstrating Public Benefit*,⁵ received a rather mixed response. The Charity Law Association pointed out that the expression 'charity test' did not appear anywhere in the Charities Act (Northern Ireland) 2008 and that its use in the draft guidance appeared to blur the distinction between the law in Northern Ireland (where, in line with England and Wales, the test of charitable status is whether or not the trust is established for charitable purposes)⁶ and the slightly different Scots approach (under which a body 'meets the charity test'⁷ if its purposes are charitable and it provides public benefit in Scotland or elsewhere). The Scottish test is ultimately concerned with outcomes, whereas in Northern Ireland, as in England and Wales, it should in principle be the objects of the trust that are at issue. In practice, the two approaches might amount to much the same thing; but they are rather different in methodology and it will be interesting to see which approach prevails.

In the Republic, section 99 of the Charities Act 2009 makes it an offence to sell a Mass card 'other than pursuant to an arrangement with a recognised person'; and a 'recognised person' for that purpose is a Roman Catholic bishop or the provincial of a Roman Catholic order of priests. As noted previously,⁸ the constitutionality of this provision was to be challenged by Mr

3 Available at <<http://www.charitycommission.gov.uk/Library/publicbenefit/pdfs/resmoral.pdf>> accessed 3 January 2010.

4 Charity Commission website 10 October 2009.

5 Available at <http://www.dsdni.gov.uk/ccni-consultation_layout_1.pdf> accessed 12 September 2009.

6 Charities Act (Northern Ireland) 2008, s 1(1)(a).

7 Charities and Trustee Investment (Scotland) Act 2005, s 7.

8 (2010) 12 Ecc LJ 82.

Thomas McNally, one of the country's largest commercial sellers of Mass cards, on the grounds that it would give the Church a monopoly on sales.

Before the High Court the State contended that section 99 was essential to prevent the sale of bogus Mass cards, while McNally argued that it violated the constitutional guarantee of 'freedom of conscience and the free profession and practice of religion... subject to public order and morality...' in Article 44.2.1°. McMenamin J found for the State, concluding that there was no evidence that in selling pre-signed Mass cards Mr McNally was engaged in the 'profession and practice' of his religion. The sole interest at risk was a commercial activity, albeit one with a religious dimension – but that was not a practice or belief. Although the effect of the section might possibly be portrayed as a discrimination of status deriving from within Roman Catholicism, that 'does not constitute any prejudicial State intrusion or discrimination where the status of a priest or an organised religion is advanced over a lay person or a business'.⁹

Scotland

In November 2009 the Scottish Government announced a consultation on the proposal to establish the Scottish Charitable Incorporated Organisation as a new legal form for Scottish charities along similar lines to that proposed for England and Wales, with a deadline for written responses of 26 February 2010. OSCR announced that it would be submitting a response on its own behalf and recommended that charities should respond individually.

CHURCH OF ENGLAND (MISCELLANEOUS PROVISIONS) MEASURE 2010

As its title suggests, this Measure makes a series of small but important technical reforms to the law of the Church. Its most important features are as follows.

- i. Sections 1 and 11 devolve responsibilities relating to land acquired or held for the purposes of the local church from the Church Commissioners to the diocesan board of finance for the diocese concerned;
- ii. Because the Church of England does not exist as a corporate entity able to receive gifts, section 9, which was included with the agreement of the Charity Commission, provides for gifts to or for the benefit of the Church to take effect as gifts to the Archbishops' Council, thereby obviating the necessity to obtain directions under the Sign Manual or a scheme made by the court or by the Charity Commission;
- iii. Section 10(2) relates specifically to Christ Church Cathedral, Oxford; it increases the number of non-residentiary canons that can be appointed,

⁹ RTÉ News: 'Mass card law challenge lost' 17 December 2009.

- allows the appointment of lay and ecumenical canons and creates a college of canons with specified functions;
- iv. Section 10(3) amends the Care of Cathedrals Measure 1990 so as to bring proposals for works which would affect human remains in cathedral precincts (which are currently subject to secular control) within the controls contained in that Measure, in the same way that human remains in churchyards are already subject to the faculty jurisdiction. The intention is to seek an amendment disapplying secular legislation in all cases where ecclesiastical controls apply, thereby avoiding dual control over human remains in cathedral precincts.

Perhaps the most important provision for at least some readers of this Journal is section 5, which brings the retirement age for diocesan chancellors into line with that for judicial appointments generally – though with the possibility of annual extensions at the discretion of the diocesan bishop.

CROWN BENEFICES (PARISH REPRESENTATIVES) MEASURE 2010

In normal circumstances, the parochial church council of a vacant benefice appoints two lay representatives whose approval is required before a patron can present or a bishop can institute a particular priest to the living; this does not, however, apply where the patronage of the benefice is vested in the Crown or the Duchies of Lancaster or Cornwall. The Measure gives parochial church councils of Crown benefices the right to appoint representatives with the power to give or withhold approval of the patron's choice of candidate, thereby removing the final decision from Ministers, in line with the Government's views on Crown appointments set out in its Green Paper of July 2007 and the recommendations put before the Synod by the Archbishops in response.

END OF LIFE ASSISTANCE (SCOTLAND) BILL

On 21 January 2010, Margo Macdonald MSP introduced the End of Life Assistance (Scotland) Bill¹⁰ into the Scottish Parliament. The Bill states in section 1 that (subject to a considerable number of detailed safeguards) 'It is not a criminal offence or a delict for a person (a) to provide end of life assistance in accordance with this Act; or (b) to provide assistance . . . to enable another person to obtain or provide end of life assistance in accordance with this Act'. It is understood that proceedings on the Bill will be the subject of a series of free votes.

¹⁰ Available at <http://www.scottish.parliament.uk/s3/bills/38-EndLifeAssist/b38s3-introd.pdf> accessed 21 January 2010.

EQUALITY AND RELIGION

As previously noted,¹¹ consideration is being given in Brussels to a Proposal for a Council Directive on equal treatment irrespective of religion or belief, disability, age or sexual orientation.¹² That proposal remains on the agenda; however, on 16 November 2009 the EU Council of Ministers adopted a series of ‘conclusions on freedom of religion or belief’¹³ at the General Affairs Council meeting in Brussels in which it reaffirmed the commitment of the EU to the promotion and protection of freedom of religion or belief and declared, *inter alia*, that

... freedom of thought, conscience, religion or belief applies equally to all persons. It is a fundamental freedom which includes all religions or beliefs, including those that have not been traditionally practiced in a particular country, the beliefs of persons belonging religious minorities, as well as non-theistic and atheistic beliefs.

The Council condemned all forms of religious intolerance and expressed its concern that legislation on defamation of religions had often been used to mistreat religious minorities and to limit freedom of expression and freedom of religion or belief, reiterating that ‘defamation of religions is not a human rights concept’ and that ‘religion may never be used to justify or condone the restriction or violation of individual rights’. In the Council’s view, freedom of religion or belief is linked intrinsically to freedom of opinion and expression. It remains to be seen how this might relate to the operation of section 36 of Ireland’s Defamation Act 2009 (of which more below).

Shortly afterwards, on 20 November, the European Commission announced that it had sent a reasoned opinion to the United Kingdom Government stating that the 2002 amendment¹⁴ of the Equal Treatment Directive had been incorrectly implemented in domestic law. The Commission argued, *inter alia*, that ‘exceptions to the principle of non-discrimination on the basis of sexual orientation for religious employers are broader than [those] permitted by the Directive’.¹⁵ In response, the Government said that it was studying the reasoned opinion in the expectation of responding early in 2010.

11 (2010) 12 *Ecc LJ* 85–86.

12 COM(2008) 426 final 2008/0140 (CNS), available at <<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0426:FIN:EN:PDF>> accessed 23 July 2009.

13 EU Council of Ministers Press Release – 16 November 2009.

14 Directive 2002/73/EC of the European Parliament and of the Council amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

15 See the Commission’s Press Release at <http://ec.europa.eu/unitedkingdom/press/press_releases/2009/pro9146_en.htm> accessed 3 January 2010.

Churches have already expressed disquiet at the way in which the Equality Bill currently before Parliament narrows the existing employment exception in the Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661¹⁶ and it may be that Commission's reasoned opinion will bring pressure on the Government to narrow that exception still further. The immediate concern, however, has been much more specific. Currently, the gender reassignment provisions of sex discrimination legislation do not engage religious marriages because the provision of 'goods, facilities and services (not normally provided on a commercial basis) at a place (permanently or for the time being) occupied or used for the purposes of an organised religion' is expressly excluded.¹⁷ The Equality Bill as introduced did not contain any similar exclusion and made it unlawful to discriminate in England and Wales or in Scotland in the provision of a 'service' (including 'facilities') to the public or in the exercise of a public function – and the prohibition extends to discrimination on the grounds of gender reassignment.

Section 5B of the Marriage Act 1949 (inserted into that Act by the Gender Recognition Act 2004) allows clergy of the Church of England and of the Church in Wales, who are otherwise obliged by common law to conduct the marriages of parishioners, to refuse to marry any person whom they reasonably believe to be of an 'acquired gender' under the 2004 Act. Where the Equality Bill intends to preserve existing statutory exceptions it does so expressly; and the two Churches contended that an express exception was required to prevent their clergy from being obliged to marry couples of the same chromosomal sex. Others claimed that it was at least arguable that clergy of other denominations (including those in Scotland) were in the same position, citing various *obiter* in *Aston Cantlow*¹⁸ in support of the view that the solemnisation of a marriage is a public function. There had not previously been any special exemption for other denominations because they had not been under a common law duty to marry people generally; but if the solemnisation of marriage were indeed a public function, the provisions of the Bill would extend to their activities as well. The Government conceded the matter and amended the Bill in the House of Lords to exempt religious organisations in Great Britain from any obligation that they might have to perform a marriage in a case where it was reasonable to believe that one of the parties had undergone gender reassignment.¹⁹

¹⁶ See (2010) 12 Ecc LJ 85.

¹⁷ Regulation 8(b) Sex Discrimination (Amendment of Legislation) Regulations 2008.

¹⁸ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*, [2003] UKHL 37 (26 June 2003): see, for example, Lord Rodger of Earlsferry, at para 170: 'when in the course of his pastoral duties the minister marries a couple in the parish church, he may be carrying out a governmental function in a broad sense and so may be regarded as a public authority for purposes of the 1998 Act'. See also Lord Nicholls of Birkenhead at 13 and 16 and Lord Hope of Craighead at 86.

¹⁹ HL Deb (2009–10) 19 January 2010 cc 907–913. The amendments inserted a new Part 5A into Schedule 3 to the Bill.

Later during the Lords Committee stage an amendment that would have meant that an organised religion could no longer apply an employment requirement for the purposes of the religion – with the result, for example, that a Church could no longer require gay clergy to be celibate – was debated and withdrawn. An amendment which would have removed the bar on holding a religious ceremony when registering a civil partnership met a similar fate. However, the Government suffered a major defeat when the Bill was amended against its wishes to maintain the status quo in relation to the Employment Equality (Sexual Orientation) Regulations 2003 by removing the ‘proportionality test’ from the Bill.²⁰ At the time of writing it was not clear whether or not the Government would accept the *fait accompli* in order to avoid a confrontation between the two Houses. Faced with the prospect of losing the Bill, the Leader of the House of Commons, Harriet Harman, announced that the Government would not be seeking to overturn the Lords amendment²¹ – so the existing law remains undisturbed.

TAXATION AND THE SUBSTANTIAL DONOR RULES

The substantial donor rules have caused problems for recipient charities ever since they were introduced by the Finance Act 2006. Their purpose is to counter perceived tax avoidance where large donations are made to charities and the value of the donation is later clawed back by transactions with the donor on non-arm’s length terms. ‘Substantial’ means a donation greater than £25,000 in any single year or a total of £100,000 over any six-year period;²² and because donations of £25,000 or more are not uncommon the result has been to penalise entirely innocent transactions. While no-one has disputed the intention behind the rules, their operation has been the subject of intense lobbying by the voluntary sector.

As part of the Pre-Budget Report package the Government announced that it intends to scrap the current rules and replace them with new powers to deny tax relief on donations to charities where the donor is party to an arrangement the purpose of which is to extract value from the charity. In short, the emphasis will now be on preventing scams rather than policing donations.²³

20 For the Amendments, see HL Deb (2009–10) 25 January 2010 cc 1211 ff.

21 ‘The amendment that we proposed in the House of Lords . . . sought to . . . make the distinction between religious and non-religious jobs clearer. The Lords did not regard our amendment as helpful. We will therefore leave the law as it is, and not bring the amendment back to this House.’: HC Deb (2009–10) 4 Feb 2010 c 468.

22 The rules are in the Income and Corporation Taxes Act 1988, ss 506 A–C and, correspondingly, in the Income Tax Act 2007 ss 549–557.

23 I am grateful to Helen Donoghue for her expert comments on this section of the Report.

VACANCIES IN SUFFRAGAN SEES AND OTHER ECCLESIASTICAL OFFICES MEASURE 2010

The Suffragan Bishops Act 1534 requires the names of two candidates to be presented to the Crown; and since the revival of suffragan bishoprics at the end of the 19th century it has been the convention that the Prime Minister should advise the Crown to appoint the first of the two names submitted. Section 1 of the 2010 Measure removes the requirement to identify a second candidate, in line with the Prime Minister's decision that he would not take an active part in choosing diocesan bishops but simply recommend to Her Majesty the candidate identified by the Church.

Section 2 empowers a suffragan or assistant bishop caring for a diocese during a vacancy in see to make appointments, under statutory delegated authority from the Crown, which would ordinarily be made by the diocesan bishop. Section 3 abolishes the Crown's historic right of patronage in a vacancy caused by the appointment of the incumbent as a diocesan bishop.

IRELAND AND BLASPHEMOUS LIBEL

The Defamation Act 2009, section 36 of which makes publication of blasphemous matter an indictable offence carrying a maximum fine of €25,000, came into force on 1 January 2010. Though subsection 36(3) provides a defence where 'a reasonable person would find genuine literary, artistic, political, scientific, or academic value in the matter to which the offence relates', the onus of proof is on the defendant. The issue remains one of considerable concern; and Atheist Ireland has begun a campaign for its repeal by publishing 25 allegedly blasphemous statements on its website and inviting the authorities to prosecute it under the new law.²⁴

doi:10.1017/S0956618X10000116

24 Available at <<http://blasphemy.ie/2010/01/01/atheist-ireland-publishes-25-blasphemous-quotes/>> accessed 2 January 2010 – though it should be said that, to the casual reader, some do not look particularly blasphemous at all.