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GOVERNMENT AND PARLIAMENTARY REPORT

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

CHARITIES AND CHARITY LAW

Annual Return 2018

The Charity Commission for England and Wales published an updated list of the questions to be included in the 2018 Annual Return for registered charities. The trustees of charities excepted from registration with the Commission – which include a considerable number of church congregations – are not required to submit an annual return; but an increasing number find that they must do so because when an excepted charity's annual income exceeds £100,000 it loses its excepted status. The previously expressed intention to require every charity trustee to provide an e-mail address has been abandoned; instead, the Commission intends to ask all trustees either to supply an e-mail address or to confirm that they do not have one – which looks very like a welcome climb-down. The Commission's on-line Annual Return Service opened for submissions on 20 August.

Automatic disqualification of charity trustees

Section 9 of the Charities (Protection and Social Investment) Act 2016 extended automatic disqualification of charity trustees to more circumstances and a wider range of people: senior managers as well as trustees. In January 2018, the Charity Commission published guidance on the new rules on automatic disqualification and updated it on 1 August, when the new rules came into operation.[1]

1 The updated guidance is available at <https://www.gov.uk/guidance/automatic-disqualification-rules-for-charity-trustees-and-charity-senior-positions?utm_source=c2d42486-7dc4-4714-9d26-22dfb9f9ba04&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate>, accessed 15 September 2018.

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Once a person is automatically disqualified, it follows that that person *cannot* be a charity trustee; and no regulatory action is required of the Charity Commission in order to trigger disqualification. It must also be emphasised that the new disqualification rules apply to trustees and senior managers of all charities based in England and Wales, whether or not they are registered with the Commission.

Isle of Man charity law consultation

The Isle of Man Government held a consultation on proposed new legislation to update and improve the island's charity law. Charities are currently registered and regulated under the Charities Registration Act 1989 and the Government has concluded that it has become outdated and needs modernising in order to retain public confidence in the Manx charitable sector. It is also necessary to take account of recent changes to the meaning of 'charity' in England and Wales, so that bona fide charities established in that jurisdiction are not prevented from carrying on activities on the island.

The Bill does not seek to make any changes to the nature of an organisation that can register as a charity in the island, nor does it alter the requirement that it have a substantial and genuine connection with the island. Further, while it extends the authority of the Attorney General in relation to consent to certain steps to be taken by charities, it does not seek to exclude the jurisdiction of the High Court under the Charities Act 1962. It has six main purposes:

i. To update the meaning of 'charity' so that it remains at least as broad as in England and Wales;
ii. To establish a modern register of charities;
iii. To help charity trustees in the proper delivery of their charities' objectives by ensuring that charities' constitutional documents are fit for purpose;
iv. To ensure more effective regulation and accountability of charities in relation to reporting requirements, the automatic disqualification of individuals for acting as trustees in certain circumstances and the risk of charities being used for money laundering or financing terrorism;
v. To improve efficiency by making HM Attorney General both the registrar and the regulator; and
vi. To establish a Charities Tribunal.

The consultation closed on 5 October.

CIVIL PARTNERSHIPS

In May, the Government Equalities Office published a policy paper on the future of civil partnership in advance of the Supreme Court's ruling on whether or not

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they should be opened up to opposite-sex couples. In brief, it explained that the Government believed that further research was required and anticipated being able to consult on the future operation of civil partnership no earlier than 2020. Responding on behalf of the Church of England, the Revd Canon Malcolm Brown, the Church's Director of Mission and Public Affairs, said that the Church believes that civil partnerships

> still have a place, including for some Christian LGBTI couples who see them as a way of gaining legal recognition of their relationship. Even if the Government's current information-gathering exercise reveals only a small number are taking up civil partnerships, we hope it will remain an option.[2]

On 27 June, however, the Supreme Court ruled unanimously – and unequivocally – in *R (Steinfeld and Keidan) v Secretary of State for International Development* [2018] UKSC 32 that sections 1 and 3 of the Civil Partnership Act 2004 are incompatible with Article 14 ECHR (discrimination) taken in conjunction with Article 8 (respect for private and family life) to the extent that they preclude an opposite-sex couple from entering into a civil partnership and made a declaration of incompatibility accordingly (para 62). At the time of writing, the Government was considering the implications of the judgment, but the Prime Minister has announced support, in principle, for the introduction of opposite-sex civil partnerships.

ECCLESIASTICAL JURISDICTION AND CARE OF CHURCHES

The Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (Commencement and Transitional Provision) Order 2018 was made on 13 June 2018. It brought the substantive provisions of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 into effect on 1 September 2018 and made transitional provision in connection with the coming into force of certain of those provisions. Section 99 of the Measure had provided for the technical provisions on commencement, extent and short title to come into force on Royal Assent.

ELECTRONIC SIGNATURES

The Law Commission for England and Wales launched a consultation, which closed on 23 November 2018, on *Electronic execution of documents* – which has obvious implications for religious groups involved in concluding contracts.[3]

2 Harry Farley, 'Worried Church of England urges ministers against scrapping civil partnerships', *Christian Today*, 17 May 2018.

3 Available at <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/08/Electronic-execution-of-documents-consultation-paper.pdf>, accessed 15 September 2018.

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The Commission's key provisional conclusions on which it invited comments were that 'an electronic signature is capable of satisfying a statutory requirement for a signature under the current law, where there is an intention to authenticate the document' and that 'legislative reform is not necessary to confirm that an electronic signature is capable of satisfying a statutory requirement for a signature' – described by Joshua Rozenberg as a 'somewhat unusual example of the Law Commission telling us what the law is rather than what it should be'.[4]

FACULTY JURISDICTION RULES

The Faculty Jurisdiction Rule Committee held a consultation on the Faculty Jurisdiction Rules 2015. The Rules were introduced with the intention of simplifying faculty procedures and reducing the burden of administration in areas where it was not serving a useful purpose by introducing a list of things that may be done without a faculty (List A) or, in some cases, following approval by the archdeacon (List B). The main interest of the revision is to increase simplification by adding items to List A and List B; and the Committee feels that there is also scope for simplifying the Rules more generally. The consultation closed on 6 August.

The responses will be considered by the Rule Committee with a view to putting amended Faculty Rules before General Synod for consideration in July 2019.

GENDER RECOGNITION

In July, the Government issued a consultation on reform of the Gender Recognition Act 2004 in relation to England and Wales.[5] Since the Act came into force, only 4,910 people have changed their gender under the Act – which is fewer than the number of transgender respondents to the Government's LGBT survey, who were clear that they wanted legal recognition but had not applied because they found the current process too bureaucratic, expensive and intrusive.

The consultation focuses on the Gender Recognition Act 2004 and it is not proposed to amend the Equality Act 2010. The accompanying press release notes that transgender people already have the legal right to change their gender 'and there is no suggestion of this right being removed'. The consultation closed on 19 October 2018.

4 On Twitter, available at <https://twitter.com/JoshuaRozenberg/status/1031812890217639936>, accessed 15 September 2018.

5 Available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721725/GRA-Consultation-document.pdf>, accessed 15 September 2018. The Scottish Government ran a separate consultation, which closed earlier in the year.

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GIFT AID DONOR BENEFITS RULES 2019

The Draft Finance Bill 2018–19 published in July includes a clause (16) putting in place the necessary legislation to make the changes to the Gift Aid donor benefits rules resulting from the protracted consultation process over the last few years. From 6 April 2019, the number of thresholds to be applied under the rules will be reduced from three to two. The new thresholds will be set at 25 per cent for donations up to £100, with an additional 5 per cent for the amount of a donation above £100, up to a maximum donation of £2,500. Under the new rules, donors will be no worse off in terms of the value of benefits that charities can offer them. For every eligible donation, the new thresholds are at least as generous as the current limit. It is difficult to conceive of any circumstances in which the activities of a church *as such* would engage the donor benefit rules; however, it is perfectly possible that a faith-based charity with regular donors might do so.

HUMANIST WEDDINGS IN NORTHERN IRELAND

In *Smyth, Re Judicial Review*,[6] Colton J had quashed the General Register Office (GRO)'s decision to refuse an application for a humanist wedding on the grounds that the refusal breached the applicant's rights under Articles 9 and 14 ECHR. 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. That judgment was appealed by the Attorney General for Northern Ireland; however, in June 2017 the Court of Appeal granted interim authority for the wedding to go ahead.

In its judgment a year later,[7] the Court of Appeal held that, although the statutory prohibition on a humanist celebrant solemnising the respondent's marriage would be discriminatory under Articles 9 and 14 ECHR, the Marriage (Northern Ireland) Order 2003 already provided a basis for avoiding such discrimination by enabling the appointment of a humanist celebrant without the need for it to be read and given effect in a way that was compatible with Convention rights pursuant to section 3 of the Human Rights Act 1998. The fact that the officiant would be appointed under Article 31 of the Order (Registrars and other staff) rather than under Article 14 (Temporary authorisation to solemnise religious marriage) did not, in the Court's view, give rise to any discriminatory difference of treatment. Therefore, humanist ceremonies were already permitted under the existing legislation. The first such weddings after the judgment took place on 25 and 26 August 2018.

6 [2017] NIQB 55.
7 In *Smyth, Re Judicial Review* [2018] NICA 25. See my case note in this issue, p 000.

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Only in England and Wales can a couple still not have a humanist ceremony – and it is a matter on which the Westminster Government continues to prevaricate. In June 2014, the Ministry of Justice launched a consultation, *Marriages by Non-Religious Belief Organisations*, which closed in September 2014. In its response, the Coalition Government said that the legal and technical requirements of wedding ceremonies and registration should be considered as well as the issue of non-religious belief ceremonies and it that it would ask the Law Commission to conduct a broader review of the law, to begin as soon as possible. The Law Commission duly did as asked, but the Government decided not to go ahead with a reform project. In light of the judgment in *Re Smyth*, however, it remains to be seen whether the Government might revisit that decision.

'NO-FAULT' DIVORCE?

In September 2018, the Secretary of State for Justice launched a consultation on introducing 'no-fault' divorce in England and Wales: *Reducing Family Conflict: reform of the legal requirements for divorce*;[8] it closed on 12 December 2018. The issue of contested divorce on the grounds of unreasonable behaviour came to public prominence as a result of the judgment in *Owens v Owens*,[9] in which the Supreme Court unanimously rejected Mrs Tini Owens' appeal against the refusal of the lower courts to grant her a divorce that was opposed by her husband – and did so with obvious reluctance.

Instead of the current grounds for proving a marriage breakdown, the Ministry of Justice is proposing a new process that will allow people to notify the court of the intent to divorce while removing the opportunity for the other spouse to contest it. Proposals detailed in the consultation include:

i. Retaining the irretrievable breakdown of the marriage as the sole ground for divorce;
ii. Removing the need to show evidence of the other spouse's conduct or a period of living apart;
iii. Introducing a new notification process where one party or possibly both, can notify the court of the intention to divorce; and
iv. Removing the opportunity for the other spouse to contest the divorce application.

The consultation also seeks views on the minimum period for the process between the decree nisi and the decree absolute.

8 Available at <https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf>, accessed 15 September 2018.
9 [2018] UKSC 41.

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As a caveat, the Government recognises that there may be exceptional circumstances in which it may be desirable to retain the ability for a spouse to defend a divorce petition: for example, if one party lacks capacity to make an informed decision to seek a divorce.

SAFEGUARDING FAILURES AND MANDATORY REPORTING

On 10 September 2018, in reply to an oral question from Baroness Walmsley (LD), the Parliamentary Under-Secretary of State at the Department for Education, Lord Agnew of Oulton, said that, although it was 'absolutely unacceptable' for anyone to conceal abuse, the Government was unpersuaded of the merits of mandatory reporting:

> All noble Lords will be aware that we have consulted on this matter. We had 760 responses from social workers, police officers and other connected parties. Some 70 per cent of them felt that mandatory reporting would have an adverse impact; 85 per cent said that it would not, in itself, lead to the appropriate action being taken.

So that's a 'No', then.

SORP REVIEW

The Charity Commission announced that the four charity regulators in the UK and the Republic of Ireland would undertake a review of the composition and constitution of the Charities Statement of Recommended Practice (SORP) Committee and the SORP-making process. The review was to be undertaken by an oversight panel consisting of an observer representative appointed by the Financial Reporting Council (FRC) and a representative from each of the four regulators, the SORP Committee having been expanded in July to include the Charity Commission for Northern Ireland and the Republic's Charities Regulator.

The review considered the composition of the advisory SORP Committee; identification of, and engagement with, key stakeholders in the SORP development process; the extent to which the views of key stakeholders have been recognised in the process; and the potential for changes to the membership of the SORP Committee should the FRC agree the remit of the SORP to make recommendations covering non-statutory financial reporting by charities. Its recommendations are to be taken forward in 2019, in time for the next SORP.

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