

PARLIAMENTARY REPORT

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CHARITY LAW

England and Wales: filing with the Charity Commission

In January the Charity Commission published its annual return form for 2013. It is largely similar to earlier versions but there are additional questions about whether or not the charity is registered for Gift Aid, its property holdings and whether any of its land or buildings is used for the charity's purposes. In addition, for 2013 the questions on overseas activities and numbers of volunteers that were previously optional are mandatory.

England and Wales: Government interim response to the report of the Hodgson Review

In December the Government published its interim response to the report of the Hodgson Review published in July 2012: *Trusted and Independent: giving charity back to charities – a review of the Charities Act 2006*. The Government broadly accepted most of the report's recommendations but noted that some of them would require more analysis and consideration before any final decision could be made about their acceptability.

Among the recommendations that have been accepted are those on the definition of charity and public benefit; the role, form and functions of the Charity Commission; and Hodgson's deregulatory proposals. The Government feels that the proposals for fee-charging by the Charity Commission and for changing registration need further work before it is possible to take a definitive view. Hodgson's proposal that charitable trusts ought to be able to pay trustees without the specific approval of the Charity Commission has been firmly rejected.

1 The items on Church of England Marriage (Amendment) Measure 2012 and the Parochial Fees and Scheduled Matters Amending Order 2012 have been adapted from posts on *Law & Religion UK* written by my co-blogger, David Pocklington, to whom I am most grateful.

The interim response came in the form of a letter from the Civil Society Minister, Nick Hurd, to Lord Hodgson dated 3 December.² Mr Hurd said that he hoped that the final response would be published ‘by the end of February’.

England and Wales: trusts

The Trusts (Capital and Income) Act 2013 was given Royal Assent on 31 January. The rules governing the treatment of trust receipts and outgoings as capital or income and the extent to which trustees who have to distinguish between income and capital should be able to invest on a ‘total return’ basis are complex, particularly in the case of trusts for interests in succession and (for the purposes of this *Journal*) charitable trusts with permanent endowment. The then Lord Chancellor asked the Law Commission to look at the rules governing the classification of trust receipts as income and capital; the circumstances in which trustees must apportion receipts and outgoings between income and capital; the circumstances in which they must convert and reinvest trust property; and the rights and duties of charity trustees in relation to investment returns on a charity’s permanent endowment.

The resulting legislation was based on the Law Commission draft with minor modifications. It includes three principal reforms:

- i. Disapplication, for new trusts, of certain technical rules requiring the apportionment of receipts and outgoings between income and capital, so that they only apply where the settlor has specifically incorporated them;
- ii. Rationalisation of the trust law classification of receipts from tax-exempt corporate demergers by ensuring that all such receipts are treated as capital, together with a power for trustees to redress an income beneficiary’s position in appropriate circumstances; and
- iii. Simplification of the procedure for the trustees of charities with permanent endowment to adopt a total return approach to investment within a framework determined by the Charity Commission, so that the amounts retained for further investment and applied for immediate spending are determined by looking across the whole investment return rather than the technical trust law classification of receipts as capital or income.

The provisions of the Act will be brought into force by order made by the Secretary of State.

England and Wales: charitable incorporated organisations

The ‘new’ corporate vehicle for charities established by Schedule 7 to the Charities Act 2006 – the charitable incorporated organisation (CIO) – finally

2 Available at <<http://www.cabinetoffice.gov.uk/sites/default/files/resources/Interim-Charities-Act-review-response-Nick-Hurd.pdf>>, accessed 24 January 2013.

sputtered into life on 10 December 2012 when the Charity Commission began accepting the first applications for registration, though registration proper did not begin until 2 January. Implementation is being phased, and CIOs will not be generally available to all-comers until late in 2014. In the first instance, applications to set up CIOs are being accepted only from charities both that are brand new and that anticipate an annual income of over £5,000.

Northern Ireland

The Charities Act (Northern Ireland) 2013 received Royal Assent on 18 January and, except for sections 4 and 5(1), came into force on the following day. The purpose of the Act is to correct the mistakes in the Charities Act (Northern Ireland) 2008 that came to light during the consultation on the original draft public benefit guidance issued by the Charity Commission for Northern Ireland (CCNI) – principally, that in drafting it the perpetrators had managed to mix up Scots and English charity law. The CCNI announced that consultations on registration and on its revised public benefit guidance would start on 4 February 2013. Registration will commence with a pilot phase involving twenty organisations; full-scale registration will begin ‘in the autumn of this year’.

CHURCH OF ENGLAND MARRIAGE (AMENDMENT) MEASURE 2012

The Church of England Marriage (Amendment) Measure 2012, which received Royal Assent on 19 December 2012, extends the scope of the ‘qualifying connection’ provisions and modifies the requirements for reading the banns. The concept of a ‘qualifying connection’ was introduced by the Church of England Marriage Measure 2008 to allow couples to marry in any church that had a special significance for them on grounds of family or other connections; however, it became apparent that there were circumstances in which the 2008 Measure had been too narrowly drawn. The 2012 Measure remedies those unintended consequences and places those who wish to marry on the basis of a qualifying connection with a particular church in the equivalent position to residents in the parish and habitual worshippers.

The 2012 Measure also gives legal effect to the form of words for the publication of banns set out in the *Common Worship* marriage service. In addition, clergy are no longer bound to read the banns at ‘Morning Service’ but may do so at whichever Sunday service is likely to attract the greatest attendance.

CONSTITUTIONAL AFFAIRS

Commission on a Bill of Rights

The Commission on a Bill of Rights duly reported³ on 18 December and, as widely expected, its report was fairly bland. Only six of the eight Commissioners were in favour of a 'British Bill of Rights': Helena Kennedy and Philippe Sands disagreed with their colleagues, believing that the majority had failed to identify any shortcomings in the Human Rights Act 1998 or in its application by the courts. Nevertheless, paragraph 67 of the Overview declared that

None of us considers that the idea of a UK Bill of Rights in principle should be finally rejected at this stage. We all consider that, at the least, it is an idea of potential value which deserves further exploration at an appropriate time and in an appropriate way.

Whatever that statement might mean in practice, it would be extremely surprising if there were any action on the report in advance of the next General Election.

Succession to the Crown Bill

The Succession to the Crown Bill was introduced into the Commons on 13 December 2012 after consultation – as envisaged in the Statute of Westminster 1931 – with the fifteen other Commonwealth countries of which the Queen is Head of State. It makes three changes to the law governing the succession:

- i. It ends the system of male-preference primogeniture, under which a younger son displaces an elder daughter in the line of succession;
- ii. It removes the statutory provisions originating in the Bill of Rights 1688/89, under which anyone who marries a Roman Catholic loses his or her place in the line of succession; and
- iii. It repeals the Royal Marriages Act 1772 (which with some exceptions makes void the marriage of any descendant of George II who marries without the Monarch's prior permission) and replaces it with a provision requiring the Monarch's consent to the marriage of any of the six persons nearest in line of succession to the Crown.

As to the last of these, failure to obtain consent will disqualify from succession but will not, as before, invalidate the marriage.

3 Available at <<http://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf>>, accessed 23 January 2013.

What the Bill does *not* do is to disturb the provisions of the Act of Settlement 1700/01,⁴ which prevent a Roman Catholic from becoming Monarch and which oblige the Monarch to ‘joyn in’ communion with the Church of England.⁵

GIFT AID AND THE GIFT AID SMALL DONATIONS SCHEME

Gift Aid claims from April 2013

From 6 April 2013 there will be three options for claiming repayments from HM Revenue & Customs: by using an online form, electronically through the claimant’s own database or by using a paper form. HMRC hopes that a general move to online claims will improve speed and accuracy as well as reducing HMRC’s compliance costs; and, though HMRC has said nothing about withdrawing the facility for paper-based claims, it obviously expects online claims to become the norm.

Under the new scheme, all claims will need to include the minimum donor information already required on the valid donor Gift Aid declaration form: title (optional), donor initials or first name, donor surname, house name/number (or first line of address if that is how the charity already stores that information), postcode (obligatory for addresses in the UK), date of donation and value of donation.

Gift Aid Small Donations Scheme

The Small Charitable Donations Act 2012, which provides the statutory basis for the Gift Aid Small Donations Scheme, received Royal Assent on 19 December. As noted previously, the Scheme will allow charities and Community Amateur Sports Clubs to claim a payment analogous with Gift Aid on small cash donations of up to £20, up to a maximum of £5,000 each year – which means that a charity claiming against the full amount will receive £1,250 from HMRC. Donors will not be required to complete a Gift Aid declaration and charities will not be obliged to provide the donors’ details with their repayment claims.

The Government made two major concessions during the passage of the Bill. First, the requirement for satisfactory compliance with Gift Aid in order to make a claim has been reduced from three years’ compliance to two. Secondly, the original proposal was that in order to claim under the Scheme the charity

4 ‘... all and every person and persons that is are or shall be reconciled to or shall hold communion with the see or church of Rome ... shall be excluded and be for ever uncapable to inherit possesse or enjoy the crowne and government of this realme ... [and] ... whosoever shall hereafter come to the possession of this crown shall joyn in communion with the Church of England as by law established. ...’

5 See above, B Morris, ‘Succession to the Crown Bill: possible untoward effects?’, (2013) 15 Ecc LJ 186–191.

would also have to have made a Gift Aid claim for the same amount: the one-to-one matching requirement. That was finally reduced in the Act to one-to-ten, which means that a charity claiming on the maximum of £5,000 in loose collections will have to demonstrate that it has claimed successfully against £500 of donations made under Gift Aid. The Scheme will come into operation on 6 April 2013.

PAROCHIAL FEES

The Parochial Fees and Scheduled Matters Amending Order 2012 amends Schedule A1 to the Ecclesiastical Fees Measure 1986 by removing Services of Prayer and Dedication after a Civil Marriage, Services of Thanksgiving for Marriage and Memorial Services from the table of matters in respect of which parochial fees may be prescribed. The Order also prescribes the parochial fees payable in respect of certain matters in connection with marriages and burials, the erection of monuments in churchyards and other miscellaneous matters. The new fees are in substitution for those prescribed by the Parochial Fees Order 2010.

SAFEGUARDING

On 1 December 2012 the Criminal Records Bureau merged with the Independent Safeguarding Authority to become the Disclosure and Barring Service (DBS) for England, Wales and Northern Ireland, established under the Protection of Freedoms Act 2012.⁶ The most important outcome of this for the Churches is that it is the prelude to portable criminal records, which, according to the Home Office, were to become available in the early part of 2013.

The intention is that the DBS will introduce an Update Service that will enable employers to check existing certificates on-line instead of having to apply for a new criminal records check every time someone applies for a job. The service will be free in respect of volunteers; there will be a small annual subscription fee for updates on paid employees.

SAME-SEX MARRIAGE AND CIVIL PARTNERSHIP

England and Wales

The Marriage (Same Sex Couples) Bill was introduced into the House of Commons on 24 January. The Bill makes provision

6 There is a helpful explanation of the DBS's role on the Home Office website at <<http://www.home-office.gov.uk/agencies-public-bodies/dbs/about-us/what-we-do/>>, accessed 7 February 2013.

... for the marriage of same sex couples in England and Wales, about gender change by married persons and civil partners, about consular functions in relation to marriage, for the marriage of armed forces personnel overseas, and for connected purposes.

Briefly, the Bill:

- i. Provides that same-sex couples in England and Wales can marry and that their marriages are to be treated in the same way as opposite-sex marriages;
- ii. Permits marriage of same-sex couples by way of a civil ceremony;
- iii. Except for the Church of England and the Church in Wales, permits religious marriage of same-sex couples where a religious organisation has opted in to that process;
- iv. Provides a process under which the Church in Wales can request legislative change to allow it to marry same-sex couples in its churches if it wishes to do so;
- v. Provides that there will be no obligation or compulsion to carry out or participate in a religious marriage ceremony of a same-sex couple; and
- vi. Provides protection under equality law for organisations and individual ministers of religion who do not wish to marry same-sex couples.

The Bill does not remove the availability of civil partnerships for same-sex couples; and civil partnership registrations on religious premises will continue on the same voluntary basis as at present – and with no religious content. Existing civil partners will be able to convert their relationship into a marriage if they so choose.

The Bill includes a series of protections against compulsion of religious organisations and their representatives that do not wish to marry same-sex couples:

- i. An explicit provision that no religious organisation or representative is required to marry a same-sex couple;
- ii. Amendments to the Equality Act 2010 to ensure that no discrimination claim can be brought against a religious organisation or an individual for not marrying a same-sex couple;
- iii. An ‘opt-in’ mechanism whereby a marriage of a same-sex couple cannot be carried out on religious premises or with a religious ceremony without the express consent of the religious organisation’s governing body;
- iv. A declaration that the legislation does not interfere with Anglican canon law; and

- v. A declaration that the common-law duty on Church of England and Church in Wales clergy to marry parishioners does not extend to same-sex couples.

The Bill was read a second time on 5 February and passed by 400 votes to 175, with the vast majority of those voting ‘No’ coming from the Conservative benches. It was to be carried over into the new Session of Parliament starting in May 2013.

Scotland

The Scottish Government has published its considered proposals on reforming marriage law⁷ together with a draft Bill.⁸ The document included a list of ‘proposed protections’ at paragraph 1.06, under which:

- i. Religious bodies that wish to solemnise same-sex marriage or register civil partnerships will have to opt in to do so;
- ii. There will be no obligation on religious bodies and celebrants to opt in to solemnise same-sex marriage and register civil partnerships;
- iii. Religious celebrants will only be able to solemnise same-sex marriages or register civil partnerships if their organisation has decided to opt in; and
- iv. If a religious body decides to opt in, there will be no obligation on individual celebrants to solemnise same-sex marriage or to register civil partnerships.

The provisions of the draft Bill go wider than same-sex marriage: for example, section 15 authorises deacons of the Church of Scotland to solemnise marriages – a function currently reserved to ministers. The Bill also proposes a new category of marriage ceremony in addition to the religious and civil ceremonies currently authorised by the Marriage (Scotland) Act 1977. Since June 2005 celebrants belonging to the Humanist Society of Scotland have been temporarily authorised to solemnise marriages under section 12 of the 1977 Act; the draft Bill contains provisions to put that on a permanent statutory footing by establishing a category of ceremony to be known as ‘belief’. ‘Belief’ celebrants will be authorised along the same lines as religious celebrants.

The draft Bill makes it clear that the introduction of same-sex marriage does not affect existing rights under the European Convention of Human Rights and elsewhere to freedom of thought, conscience, religion and expression. In

7 Available at <<http://www.scotland.gov.uk/Publications/2012/12/9433/0>>, accessed 24 January 2013.

8 Available at <<http://www.scotland.gov.uk/Publications/2012/12/9433/272409>>, accessed 24 January 2013.

addition, the Lord Advocate will publish prosecutorial guidelines on allegations of breach of the peace and threatening or abusive behaviour arising out of opposition to same-sex marriage.

The detailed proposals were the subject of a further consultation which ended on 20 March.

Northern Ireland

On 1 October 2012 the Northern Ireland Assembly rejected by 50 votes to 45 a private Member's motion calling on the Executive to introduce same-sex marriage legislation. The narrowness of the margin, however, is by no means an indicator that the position is likely to change in the foreseeable future. Under the rules of the Assembly, the Democratic Unionist Party entered a Petition of Concern under SO No 28 – as a result of which the issue required a cross-community majority (ie a majority of Unionists as well as a majority of Nationalists) in order to be approved.

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