

PARLIAMENTARY REPORT

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ASSISTED SUICIDE

The issue of assisted suicide has been a matter of considerable controversy. On 9 December 2008 the incoming Director of Public Prosecutions, Keir Starmer QC, announced that he would not prosecute Mark and Julie James for taking their son Daniel, paralysed as a result of a rugby accident, to an assisted-dying clinic in Switzerland. At the same time, Margo MacDonald MSP has been attempting to change the law in Scotland, where assisting the suicide of another is a common law offence.¹ During the Lords committee stage of the Coroners and Justice Bill Lord Falconer moved a new clause to make it legal to help another to travel to a country in which assisted dying was lawful, in circumstances where that person had made a formal declaration of intent to travel abroad in order to die and two doctors, independent of each other, had certified that that person was terminally ill and had the necessary mental capacity to make the declaration. For the Government, Lord Bach said that Ministers felt that the Bill was not the appropriate vehicle for changing the law on assisted suicide and suggested that if Falconer wished to pursue the matter further he should do so through a Private Member's Bill – and the new clause was duly defeated by 194 votes to 141.²

However, at least so far as England and Wales is concerned the issue may have been overtaken by the House of Lords decision in *Purdy, R (on the application of) v DPP*³ to oblige the Director to publish guidance on prosecution policy under sections 2(1) & (4) of the Suicide Act 1961 in respect of those who assist others to commit suicide. The Director's interim guidance was duly published on 23 September and a consultation was launched at the same time.⁴ The guidance sets out the primary public interest factors both for and against prosecution but – perhaps inevitably – does so in general terms. At the same time the Lord

1 See (2009) 11 Ecc LJ 345–346.

2 HL Deb (2008–09) 7 July 2009 cc 595–636.

3 [2009] UKHL 45 (30 July 2009).

4 Available at <http://www.cps.gov.uk/consultations/as_policy.html>, accessed 25 September 2009.

Advocate, Elish Angiolini QC, issued a statement to the effect that, though Crown Office and the Procurator Fiscal Service would give careful consideration to its implications, the Director's interim guidance did not apply in Scotland and 'any change in the current law related to homicide is properly a matter for the Scottish Parliament'.⁵

CHARITY LAW

The end of the Charity Tribunal

On 1 September 2009 the Charity Tribunal was wound up and its functions transferred to the new, unified tribunal system. The jurisdiction was transferred to the First-tier Tribunal and to the Upper Tribunal, with the question as to which one of them is to exercise the function in a particular case being determined by Tribunal Procedure Rules. The President of the Charity Tribunal becomes a deputy judge of the Upper Tribunal and transferred-in judge of the First-tier Tribunal, legal members become transferred-in judges of the First-tier Tribunal and ordinary members become transferred-in 'other members' of the First-tier Tribunal.⁶

England and Wales

In July the Charity Commission for England and Wales published its first batch of public benefit assessments. The charities chosen for scrutiny covered a range of sizes, locations and types of activity. The four religious charities scrutinised passed the Commission's assessment, though in two cases – the Sri Murugan Temple and the Tara Mahayana Buddhist Centre – the assessment reports had recommendations to make about good practice. The Church Mission Society and United Christian Broadcasters Ltd passed without qualification. Much more controversial was the conclusion that two of the independent schools that were assessed were not operating for the public benefit.

Shortly before the close of the period under review, long-awaited legislation was published to consolidate most of the charity legislation for England and Wales. The draft Charities Bill will repeal and replace the Recreational Charities Act 1958, the Charities Act 1993 and most of the provisions of the Charities Act 2006.⁷ The aim is to make the legislation simpler, better structured and more accessible to the lay person; and although the Bill does not introduce any new policy, it restructures and modernises the existing text. A draft pre-consolidation amendment Order has also been prepared which corrects

5 Available at <<http://www.law.ed.ac.uk/sln/blogentry.aspx?blogentryref=7908>>, accessed 25 September 2009.

6 Transfer of Functions of the Charity Tribunal Order 2009, SI/2009/1834.

7 The provisions of the Charities Acts 1992 and 2006 which also apply to institutions other than charities are not included in the draft Bill because they form a separate subject in their own right.

minor mistakes in the existing legislation, removes unnecessary inconsistencies and repeals spent provisions.

Ireland

The new Charity Commission for Northern Ireland began the process of implementing the Province's new Charities Act with a consultation document, *Meeting the Charity Test – Demonstrating Public Benefit*.⁸ Almost inevitably, it bears a considerable family resemblance to previous consultations for Great Britain. The consultation closed on 27 November 2009.

In the Republic (where, presumably, the Charities Regulatory Authority will be producing a consultation document on public benefit some time in 2010) the entry into force of the 2009 Act on 1 September was nearly derailed by an application from a producer and seller of Mass cards for an interlocutory injunction restraining the State from commencing the Act, contending that the effect of the ban in section 99 on private sellers of Mass cards was to give the Roman Catholic Church a monopoly on sales. It was subsequently decided that an injunction was unnecessary and the Act duly came into force; but the legality of section 99 was to be the subject of a hearing in the High Court in October and in the meantime there would be no prosecutions for selling Mass cards.⁹

Scotland

In Scotland, the Government published the Public Services Reform (Scotland) Bill which, inter alia, amends the Charities and Trustee Investment (Scotland) Act 2005 to allow charity trustees to use charity funds to purchase indemnity insurance against personal liability either as trustees or as directors or officers of any body corporate carrying on activities on behalf of the charity. But perhaps the most significant event was the publication of the final report of the Calman Commission on Devolution.

Concerned at the complexities inherent in a situation where there are now different charity laws in Scotland and in England and Wales, Calman recommended that the Westminster Parliament, with the consent of the Scottish Parliament, should enact a single definition of 'charity' and 'charitable purpose' applicable across the United Kingdom and that a charity registered in one jurisdiction should be able to operate in another without having to register afresh or being subjected to the other jurisdiction's reporting and accounting requirements.¹⁰ Overall, the report received a muted response from the Scottish

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

9 'Mass card prosecutions put off until High Court rules on Act' *The Irish Times* 1 September 2009.

10 *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century*, available at <<http://www.commissiononscottishdevolution.org.uk/uploads/2009-06-12-csd-final-report-2009/bookmarked.pdf>>, accessed 12 September 2009; see recommendations 5.2 and 5.3.

Government – and unsurprisingly so, given that the SNP did not take part in the Calman exercise – but its charity law proposals were roundly rejected by no less an authority than the Scottish Council for Voluntary Organisations (SCVO), which warned that they would simply create a new set of complications and undermine public faith in the status of Scottish charities.

All one can say from an English perspective is, ‘that’s devolution’. Scots and English law have always differed in numerous respects; and if a devolved administration can never legislate for local circumstances for fear of upsetting folk on the other side of the border, then what useful purpose does it serve?

CLERGY TERMS AND CONDITIONS OF EMPLOYMENT

The assiduous may recall that in 2007 a DTI Working Group, including representatives of faith communities and trades union delegates, took part in a consultation exercise that resulted in the publication of a *Model Statement of Good Practice* on clergy employment. The then Parliamentary Under-Secretary of State for Trade and Industry, Jim Fitzpatrick, said that his Department would revisit the issue in two years’ time and then ‘consider if any further action is appropriate, *including legislative action*’.¹¹

The issue has now been revived. On 23 June 2009 the current Minister of State at what is now the Department for Business, Innovation & Skills, Pat McFadden, wrote asking recipients ‘to report back to me on relevant developments in your own faith group since the statement of good practice was issued’. It remains to be seen how the issue will develop; but it is clear that Government is not going to let the issue of clergy terms and conditions simply go by default.

COMMUNITY INFRASTRUCTURE LEVY

The exemption from Community Infrastructure Levy (CIL) for charities and similar not-for-profit organisations that develop their land for their own use was set out in draft Regulations published at the end of July.¹² The proposed relief has immediately run into a problem: the extent to which it might constitute a state aid in contravention of European law.

The state aids rules apply only to an ‘undertaking’ for the purposes of European law; and though churches *qua* churches are clearly not ‘undertakings’, other church charities such as schools and retirement homes might well be regarded as such. The situation appears to be rather confused; not only are officials concerned that relief from CIL might constitute a state aid, but they also seem unsure as to whether or not other benefits, such as tax reclaimed

¹¹ HC Deb (2007–07) 20 March cc 43–44 WS (emphasis added).

¹² Available at <<http://www.communities.gov.uk/documents/planningandbuilding/pdf/1301120.pdf>> accessed 29 September 2009: the relevant Regulations are 17 to 22.

under the Gift Aid Scheme, are to be counted in the *de minimis* limit for state aid of €200,000 over three years – above which limit more rigorous criteria begin to apply. This is a potential nightmare for charities; and representatives of the voluntary sector have since had several meetings with officials in the relevant departments.

CONSTITUTIONAL AFFAIRS

Included in the Government's draft legislative programme for what will be the last session of the present Parliament was a Constitutional Renewal Bill which, *inter alia*, would finally remove hereditary Peers from the House of Lords. Whether or not further reform of the Lords will lead to a wholly-elected second chamber shorn of bishops remains unclear. In an interview with *The Guardian* Jack Straw, the Lord Chancellor, said that all the parties were agreed that 'moving to an 80 per cent or 100 per cent elected house will take three parliaments'.¹³ On that basis, the bishops appear to be safe for some time yet, not least because there is no guarantee that an incoming government of a different political persuasion – even one committed to further constitutional reform – would necessarily regard the matter as a high priority for legislation.

EQUALITY AND RELIGION

The Equality Bill¹⁴ was introduced into the Commons on 24 April 2009 and Second Reading took place on 11 May. Assuming that it receives Royal Assent, the Bill, which is intended both to strengthen the law on equality and to consolidate and simplify existing legislation, is expected to come in to force from autumn 2010. One of the major changes it proposes is the extension of the equality duty laid on public authorities to the characteristics of age, religion or belief and sexual orientation, requiring them to have due regard to the need to eliminate discrimination and other prohibited conduct, to advance equality of opportunity and to foster good relations between different groups.

The potential problem is the balance between rights and duties. Generally speaking, churches are not 'public authorities';¹⁵ however, they do undertake duties of a public nature (such as registering marriages). Moreover, churches sometimes work in collaboration with public-sector bodies which will themselves be obliged to have regard to the equality duty – and that fact might oblige a church to act in a manner contrary to its own ethos in some

13 Nicholas Watt: 'Jack Straw to outline Lords reforms but warns of 12-year delay' *The Guardian* 26 August 2009.

14 Available at <http://www.publications.parliament.uk/pa/cm200809/cmbills/085/09085_iw/09085_iw_en_1.htm>, accessed 5 June 2009.

15 *Aston Cantlow and Wilmore with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546, HL.

circumstances.¹⁶ In addition, some churches are concerned that the exemption currently available under the Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661, in relation to employment for the purposes of an organised religion is to be re-enacted in a form which is considerably more restrictive than it is at present. This issue was thought serious enough for the Secretary-General of the Church of England's General Synod and a representative of the Catholic Bishops' Conference of England and Wales to give oral evidence to the committee considering the Bill.¹⁷ At the time of writing, the Bill had completed its Commons committee stage.

Meanwhile, in Brussels, consideration is being given to a Proposal for a Council Directive on equal treatment irrespective of religion or belief, disability, age or sexual orientation.¹⁸ The current draft states that there is no intention, on grounds of subsidiarity, of intervening in issues such as education, marital or family status, adoption, reproductive rights or similar questions. Nor does the draft Directive affect national rules governing the activities of religious organisations or their relationship with the state.

So, for example, it will remain for Member States alone to take decisions on questions such as whether to allow selective admission to schools, or prohibit or allow the wearing or display of religious symbols in schools, whether to recognise same-sex marriages, and the nature of any relationship between organised religion and the state.¹⁹

The proposal has had its first (and only) reading in the European Parliament and must be approved or rejected by the Council of Ministers. The most recent proposal from the Swedish Presidency on the section of the draft relating to religion reads as follows:

2. This Directive does not alter the division of competences between the European Community and the Member States. In particular it does not apply to:
 - (a) matters covered by family law, including marital status and adoption, and laws on reproductive rights;
 - (b) the organisation of Member States' social protection systems, including decisions on the setting up, financing and management of such systems and related institutions as well as on

16 See, for example, *Catholic Care (Diocese Of Leeds) v Charity Commission for England and Wales* [2009] Charity Tribunal CA/2008/0003, noted at (2009) 11 Ecc LJ 369.

17 Their evidence is available at <<http://www.publications.parliament.uk/pa/cm200809/cmpublic/equality/090609/am/90609s01.htm>>, accessed 11 September 2009.

18 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.

19 COM(2008) 426 final 2008/0140 (CNS) 6.

- the substance and delivery of benefits and services and the conditions of eligibility;
- (c) the powers of Member States to determine the type of health services provided and the conditions of eligibility; and
 - (d) the content of teaching or activities and the organisation of Member States' educational systems, including the provision of special needs education.
3. Member States may provide that differences of treatment based on religion or belief in respect of [...] admission to educational institutions, the ethos of which is based on religion or belief, in accordance with national laws, traditions and practice, shall not constitute discrimination.
 - 3a. This Directive is without prejudice to national measures authorising or prohibiting the wearing of religious symbols.
 4. This Directive is without prejudice to national legislation ensuring the secular nature of the State, State institutions or bodies, or education, or concerning the status and activities of churches and other organisations based on religion or belief.²⁰

GIFT AID

Reference has been made in previous Parliamentary Reports to various issues associated with the Gift Aid Scheme. The transitional rate of 22 per cent announced in the 2008 Budget ceases at the end of financial year 2010–11 and HMRC and the voluntary sector are continuing their discussions on the operation of the Scheme. However, HMRC has announced that from 1 April 2010 the general time-limits for making repayment claims of any kind will be four years rather than six. This includes Gift Aid refunds; and it is hoped that, rather than leaving things until the last minute, church treasurers will start checking whether or not all possible claims have in fact been made.

LAND REGISTRATION

New land registration rules affecting non-company charities came into force on 6 April 2009. If a charity owns land that is not registered under the Land Registration Acts, is vested in the names of individual trustees and is transferred to a new trustee by deed after 6 April 2009, then the land will probably have to be registered with the Land Registry. The only exception is land held under a lease which has fewer than seven years to run. A charity that registers the

²⁰ Interinstitutional File: 2008/0140 (CNS) Brussels, 15 September 2009 13238/09 available at <<http://register.consilium.europa.eu/pdf/en/09/st13/st13238.en09.pdf>>, accessed 26 September 2009.

land voluntarily before the next transfer will get a 25 per cent discount on the normal Land Registry first registration fee. More information is available in two Land Registry Practice Guides – *First Registration – advice for trustees (No 1)* and *Charities (No 14)*.

PUBLIC ORDER ACT 1986

In order to secure the passage of the Criminal Justice and Immigration Act 2008, which inserted into the Public Order Act 1986 the offence of incitement to hatred on grounds of sexual orientation, the Government did not seek to overturn an amendment inserted in the Lords to the effect that discussing or criticising sexual conduct or urging people to modify their sexual behaviour would not of itself be regarded as threatening or intended to stir up hatred.

The issue was put to the test once more during proceedings on the Coroners and Justice Bill. Clause 61 of the Bill as introduced in the Commons would have removed the offending inserted section; however, in committee the Lords rejected Clause 61 by 133 votes to 186²¹ and refused to concede on the matter thereafter. Faced with losing the entire Bill the Government backed down; and the text that went for Royal Assent did not include the original Clause 61.

IRELAND, THE CONSTITUTION AND BLASPHEMOUS LIBEL

As noted in the previous issue, the Irish Minister for Justice announced the Government's intention to amend the Defamation Bill before *Dáil Éireann* to make the publication of 'blasphemous matter' an indictable offence.²² The Bill as passed abolished the common law offences of criminal libel, seditious libel and obscene libel, fixed the maximum fine for the publication of blasphemous matter at €25,000 and provided a defence of 'genuine literary, artistic, political, scientific or academic value' in respect of allegedly-blasphemous material. President McAleese signed the Bill into law on 23 July – but not before she had consulted the Council of State as to whether or not the Bill should be referred to the Supreme Court under Article 26 of the Constitution as 'repugnant' to the Constitution.²³

doi:10.1017/S0956618X09990421

21 HL Deb (2008–09) 9 July 2009 c 819.

22 Defamation Bill 2006: Committee Amendments 28 April 2009: Amendment 40.

23 'McAleese signs Bills into law' *The Irish Times* 23 July 2009. The text is available at <<http://www.oireachtas.ie/documents/bills28/acts/2009/a3109.pdf>> accessed 12 November 2009.