CHURCHES' LEGISLATION ADVISORY SERVICE

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Disclaimer

CLAS is not qualified to advise on the legal and technical problems of members and does not undertake to do so. Though we take every care to provide a service of high quality, neither CLAS, the Secretary nor the Governors undertakes any liability for any error or omission in the information supplied.

It would be very helpful if members could let us know of anything that appears to indicate developments of policy or practice on the part of Government or other matters of general concern that should be pursued.

CHARITIES & CHARITY LAW

Charity Commission Annual Report and Accounts 2018

For information

The Charity Commission has published its Annual Report and Accounts for 2018. The report notes that regulatory compliance cases have increased by a third in the year 2017-18 to a total of 2,269. In the Commission's renewed risk framework in 2017 it reconfirmed that its priorities are safeguarding, fraud and financial abuse, terrorism and counter-extremism and other risks to the public trust and confidence. Following recent high-profile abuse cases within the charity sector, of the 2819 serious incident reports received in 2017-2018, 56 per cent related to safeguarding.

The report also notes that the Commission will be publishing its new strategic plan during 2018.

[Source: *Charity Commission* – 12 July]

NCVO draft code of ethics

For information

Following revelations of abuse in the charity sector, the National Council for Voluntary Organisations has published a draft code of ethics for the sector, intended to provide an overarching framework within which charities may review their existing policies to identify where changes may be necessary. In the hope that the code of ethics will become the charity sector's equivalent to the Nolan Principles for public office, NCVO is calling upon charities to commit publicly to the code or explain why they have chosen not to.

The code proposes four principles that charities should commit to and uphold in their governance; putting beneficiaries first, integrity, openness and the right to be safe. The code is open for consultation: responses should be made by e-mail, by **26 September**.

[Source: NCVO – 4 July]

EMPLOYMENT

Apprenticeship levy transfers

For information and possibly for action

Apprenticeships and Skills Minister Anne Milton recently announced that large employers would soon be able to transfer up to 10% of their apprenticeship levy funds to multiple businesses. Under original proposals, levy-paying employers were to be able to transfer up to 10 per cent of their apprenticeship service funds to one other employer *only*. From July 2018, however, employers will now be able to make transfers of up to 10 per cent of their unspent funds to as many other employers as they choose.

Given that Churches, of their nature, have few "apprenticeships" to offer, this increased flexibility is welcome news. Nevertheless:

- Employers' organisations continue to lobby vigorously for even greater freedom (requests range from 30-50 per cent of the levy being transferrable), as well as greater flexibility in other areas.
- There is continued pressure for a major review of Apprenticeship oversight and funding, including from strong supporters of the programme. That criticism is mainly focused on implementation issues, especially what is felt to be excessive bureaucracy and significant delays in approving new standards and responding effectively to the needs of smaller businesses.
- While the Government has acknowledged that there are difficulties and that the criticisms are being taken seriously, it does not agree that there is a need for radical reform of the implementation process or the funding.
- The Institute for Apprenticeships remains the subject of a good deal of criticism.

The Government has also now responded to a written question in the House of Lords, making it clear that transfers for levy payers will have to remain *within their maximum 10% transferable allowance*: "this change does not mean that an employer can transfer 10% of their total levy funds to each employer in receipt. The 10% annual transfer allowance represents the maximum total value of funds an employer is able to transfer within a year."

[Source: Department for Education – 26 June]

Court of Appeal overturns sleep-in shift ruling in Mencap case

For information

The Court of Appeal has reversed an Employment Tribunal judgment on the eligibility for National Minimum Wage payments of staff who are obliged to stay overnight at work.

In a single judgment, the Court held in *Royal Mencap Society v Tomlinson-Blake* [2018] EWCA Civ 1641 that the time spent asleep by "sleepers-in" – workers who are "contractually obliged to spend the night at or near their workplace on the basis that they are expected to sleep for all or most of the period but may be woken if required to undertake some specific activity" [6] – does *not* count for the purposes of the National Minimum Wage Regulations [86].

Ms Tomlinson-Blake, a care support worker employed by Mencap, had claimed that she was entitled to have all the hours she spent "sleeping-in" counted as work-time for the NMW – and the Employment Tribunal and the Employment Appeal Tribunal upheld her claim. The Court of Appeal, however, concluded that that was wrong in law: Ms Tomlinson-Blake "slept by arrangement at her place of work and was provided with suitable facilities for doing so … It follows that she is to be treated as being available for work during those hours and not actually working and that the sleep-in exception applies. *The result is that only those hours during which she was required to be awake for the purpose of working count for NMW purposes*" [93: emphasis added].

In *Shannon v Rampersad*, decided along with *Royal Mencap*, Clifton House residential care home employed Mr Shannon as "on-call night care assistant". He had accommodation in a top-floor flat on the premises and was required to be there from 10 pm until 7 am. He had argued that all the hours between 10 pm and 7 pm should be counted as salaried hours for the purposes of the NMW – and claimed pay arrears of almost £240,000. The Court concluded that it was "impossible on any common-sense approach to describe the Claimant as actually working except when he was called on to assist the night care worker" [98].

But that might not be the end of the story. Ms Tomlinson-Blake was supported by her trade union, Unison, and according to *Civil Society* she is likely to appeal to the Supreme Court.

[Source: BAILII – 13 July]

FAITH AND SOCIETY

Door-to-door preaching, the Court of Justice and the GDPR

For information

The Court of Justice of the EU has ruled that data collected in the course of door-to-door evangelism comes under the purview of the General Data Protection Regulation. In *Jehovan todistajat* [2018] EUECJ C-25/17, the CJEU held that a religious community such as the Jehovah's Witnesses (JWs) is a data controller, jointly with those of its members who engage in preaching, for processing personal data collected in the course of door-to-door preaching. Consequently, *the processing of personal data carried out in the context of such activities must respect the EU law on the protection of personal data*.

The background is that JWs take notes as an *aide-mémoire* during their door-to-door preaching about visits they make to persons who are unknown to themselves or to the wider JW community. The data collected may include names and addresses of persons contacted and information about their religious beliefs and family circumstances. The data may be retrieved for any subsequent visit *without the knowledge or consent of the persons concerned*. After the Finnish Data Protection Supervisor prohibited the JWs from collecting or processing personal data in the course of door-to-door preaching unless they observed the domestic legislation on processing of personal data, the JWs challenged the decision; and the Finnish Supreme Administrative Court sought a preliminary ruling on the matter from the CJEU. The CLEU held that door-to-door preaching by the JWs was not covered by the exceptions laid down by EU law on the protection of personal data. The fact that door-to-door preaching was protected by the fundamental right of freedom of conscience and religion in Article 10(1) of the EU Charter of Fundamental Rights *did not trump the GDPR*.

The Court concluded that, for the purposes of EU law on the protection of personal data, *a religious community is a controller, jointly with its members who engage in preaching, of the processing of personal data carried out by the latter in the context of door-to-door preaching* organised, coordinated and encouraged by that community, without it being necessary that the community has access to that data or to establish that the community has given its members written guidelines or instructions in relation to processing that data.

Comment: Not many Churches engage in door-to-door evangelism nowadays: *however*, it is not inconceivable that the ruling might also apply such things as information collected in the course of regular door-to-door charitable collections. The message is, *do be very careful*. Make sure that volunteers in door-to-door campaigns collect no more than the absolute minimum of personal data – or, preferably, none at all – and, if you *must* collect it, be extremely careful about any use that you make of it subsequently.

[Source: BAILII – 10 July]

Governance of C of E cathedrals

For information

Following debate at the General Synod in York, the Church of England has issued a press release on plans to streamline cathedral governance and management following the recommendations in the report of the Cathedrals Working Group. The report noted failings in governance and management within a small number of cathedrals which, though not widespread, highlighted vulnerabilities across the sector. The Group's recommendations include:

- retaining the Chapter as the governing body of a cathedral but changing its composition to provide for a majority of non-executive members, while establishing separate senior-executive teams to oversee day-to-day operations;
- a dialogue with the Government on establishing a significant cathedral fund *for the UK* – evidently not just for England alone or for England and Wales; and
- amending the Charities Act 2011 to bring all cathedrals under the jurisdiction of the Charity Commission.

Consultation on the report took place earlier in 2018, with responses from members of cathedrals, the wider Church, Government and the Charity Commission. A Cathedrals Support Group will be established to aid the implementation of the recommendations.

[Source: CLAS Summary]

Modern slavery

For information

The Second Church Estates Commissioner, Dame Caroline Spelman MP, answered an oral question from Bob Blackman MP (*Con, Harrow East*) on progress in tackling modern slavery. She highlighted progress made by the "We See You" campaign, working in schools to raise children's awareness of modern slavery, alongside Just Enough UK – adding that its purpose, as much as anything, is to protect the children themselves from becoming victims. She also highlighted the work of the Clewer Initiative on modern slavery established by the Church of England.

[Source: Commons *Hansard* – 12 July]

FUNDING

Gift Aid donor benefit rules 2019

For information

The Draft Finance Bill 2018-19 has been published: it 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 that has taken place 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.

[Source: HM Treasury – 6 July]

PROPERTY & PLANNING

MHCLG and the future of the high street

For information

The Ministry for Housing, Communities and Local Government (MHCLG) has announced that a call for evidence will be published "in due course", asking organisations and individuals for their opinions on the future of high streets. The Government intends to use this call for evidence better to understand the changes that have taken place in recent years to the concept of the high street and to understand what people actually want from these community spaces. In advance of the call for evidence a panel – including representatives of the retail, property and design sectors and chaired by Sir John Timpson (of the shoe repair / key cutting / dry cleaning chain) – has been appointed to undertake the review, tasked with identifying the current challenges and suggesting options to ensure that town centres remain vibrant.

Church organisations that run their own charity shops, or which work with them on a regular basis, may be particularly interested in responding to this call for evidence when it is published. Although CLAS is unlikely to submit a corporate response, we will let you know once the panel's recommendations have been published and it is possible to respond.

Coincidentally (or perhaps not), the Institute for Fiscal Studies has issued a press release of the text of an article by its Director, Paul Johnson, in which he argues that abolishing business rates is emphatically not the answer to the high street's problems. Though it may appear that the tax system gives online retailers a competitive advantage, he suggests that cutting or abolishing business rates for high street shops would probably not be as helpful as one might imagine and argues that, though cutting business rates might reduce a retailer's costs in the short run, in the longer term it will simply lead to higher rents. Nevertheless, his view is that the present system of business rates has many shortcomings and he would prefer a tax on the value of the land on which the business sits rather than the rental value of the property and a move towards taxing the owners of properties rather than their tenants.

His gloomy prediction is that, whatever happens, the growth of online retail will squeeze traditional high street retail:

> "There might be very good social reasons for government intervening to mitigate that effect, especially in poorer and more vulnerable communities. The point is that cutting business rates will not achieve that end."

[Sources: IFS – 9 July: MHCLG - 16 July]

SAFEGUARDING

Charity Commission and Department for Education updates on safeguarding

For information and possibly for action

The Charity Commission has published an update on the work of the interim safeguarding task force that was set up in February to handle the increase in safeguarding incidents reported and undertake a review of historic safeguarding issues. Between February and May 2018, the Charity Commission received 1,152 reports of serious safeguarding incidents – compared to 1,210 during 2016-17 and 1,580 during 2017-18 – which included both reports of harm caused by a charity and reports of risk of harm where an internal audit had found that safeguarding procedures had not been followed.

In addition to dealing with new cases, the taskforce has been undertaking a review of its records of serious incident reports and assessing whether charities followed up their reports with appropriate action. Of the 5,238 cases reviewed, 3,000 were found to be allegations of potentially criminal behaviour, all of which were reported to the authorities at the time. The Commission has said that it will publish a full report outlining key findings and lessons for charities when taskforce finishes its work.

Hard on the heels of the Commission's update, the Department for Education issued *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children*: it updates and replaces *Working Together to Safeguard Children* (2015).

Members should take particular note of paragraphs 57 to 62 – Voluntary, charity, social enterprise, faith-based organisations and private sectors – which emphasise that voluntary organisations should have appropriate arrangements in place to safeguard and protect children from harm and that charity trustees are responsible for ensuring that those benefiting from, or working with, their charity, are not harmed in any way through contact with it. Moreover, all practitioners working in organisations and agencies who are working with children and their families are subject to the same safeguarding responsibilities, *whether paid or volunteers*. There is a very helpful analysis of the changes from the earlier DfE guidance on Farrer & Co's website, here.

[Sources: Charity Commission – 3 July: DfE – 4 July: Farrer & Co – 12 July]

TAXATION

HMRC guidance on Making Tax Digital for VAT

For information and possibly for action

From 1 April 2019, all VAT-registered businesses (including charities) with a taxable turnover above the VAT threshold (£85,000) will be required to keep their VAT business records digitally and send their VAT returns using Making Tax Digital (MTD) compatible software. HMRC has published VAT Notice 700/22: Making Tax Digital for VAT, which provides full guidance on how MTD will work in practice. HMRC has published a helpful stakeholder communications pack intended to provide source material and information to help inform stakeholder's MTD communications for both Income Tax and VAT.

Software suppliers: More than 130 software suppliers have told HMRC that they are interested in providing software for MDT for VAT and over 35 expect to have software ready during the first phase of the pilot in which HMRC is testing the service with small numbers of invited businesses and agents. The suppliers listed here have tested their products in HMRC's test environment and have already demonstrated a prototype of their software to HMRC.

VAT Notice 700/22: Making Tax Digital for VAT provides further information: links as follows:

1. Introduction
2. Check if you have to follow the Making Tax Digital rules
3. Digital record-keeping
4. Voluntary updates
5. Supplementary data
6. Agents
7. Examples of where a 'digital link' is required
8. Your rights and obligations
9. If you have a question about VAT, excise or customs duty
10. Putting things right
11. How HMRC uses your information

[Source: HMRC – 13 July]