

## CLAS CIRCULAR 2023/09 (28 April 2023)

### Disclaimer

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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.

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## CHARITIES AND CHARITY LAW

### Charity Commission: Road-testing the new investment guidance for trustees

For information

[Explainer](#) on the process of testing the new guidance prior to its adoption by the Commission:

'We have identified a representative sample of around 1,000 charities that have investment income, so whose trustees invest charitable funds or assets, and therefore need to use and understand our guidance. We have also shared the draft guidance with some charity lawyers and a limited number of other groups who represent the interests of charities with investments.'

The updated guidance reflects the judgment in *Butler-Sloss & Ors v The Charity Commission for England and Wales & Anor* [\[2022\] EWHC 974 \(Ch\)](#), which ruled that charities can adopt an investment policy which excludes potential investments that the trustees believe are in conflict with their charitable purposes.

### Vicarious liability in the Supreme Court

For information

"Vicarious liability" is a legal concept that assigns liability to an individual who did not actually cause the harm, but who has a specific superior legal relationship to the person who did cause the harm. There have been several cases in the past few years in which Churches have been held vicariously liable for torts (usually of a sexual nature) carried out by their clergy and employees. The latest case before the Supreme Court seems to have slightly narrowed the grounds of liability.

In *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB* [\[2023\] UKSC 15](#), Mr and Mrs B began attending services at the Barry Congregation of Jehovah's Witnesses in 1984. They made lots of friends in the congregation, among whom were Mark Sewell, his wife Mary and their children. Mark Sewell was an elder; however, he began drinking heavily and became depressed. He started behaving inappropriately towards female members of the congregation, for example by kissing them on the lips when he greeted them. His father, also an elder, had asked Mr and Mrs B to give him emotional support. In 1990, Sewell raped Mrs B after they had been out evangelising together and in 2014 he was convicted of raping her and indecently assaulting two other people.

In 2017, Mrs B brought a claim for damages against the JWs' worldwide governing body, the Watchtower and Bible Tract Society of Pennsylvania, and the Trustees of the Barry Congregation, claiming that they were vicariously liable for the rape because of the nature of their relationship with Sewell and because of the connection between that relationship and the commission of the rape. Both the High Court and the Court of Appeal found in her favour. On appeal to the Supreme Court, however, those judgments were reversed.

There is a two-stage test for vicarious liability: whether the relationship between the primary wrongdoer and the organisation that is being sued is sufficiently close as to make the organisation liable, and whether there is a sufficiently close connection between the wrongdoing and the employment, so that it will be fair and just to hold the employer vicariously liable.

The Supreme Court held that the Barry Congregation Trustees and the Watchtower and Bible Tract Society were *not* liable, for the following reasons among others:

- the rape was committed in Sewell's own home, and he was not carrying out any activities as an elder on behalf of the Jehovah's Witnesses at the time;
- unlike child sexual abuse cases, Sewell was not exercising "control" over Mrs B because of his position as an elder – she was there because of her close friendship with him and because she was seeking to provide emotional support to him;
- 'Mark Sewell was not wearing his "metaphorical uniform as an elder" at the time the tort was committed'; and
- the rape was not equivalent to the gradual grooming of a child for sexual gratification by a person in authority over that child: it 'was rather a shocking one-off attack. In any event, the prior events owed more to their close friendship than to his role as an elder'.

In short, said Lord Burrows, 'The rape was not so closely connected with acts that Mark Sewell was authorised to do that it can fairly and properly be regarded as committed by him while acting in the course of his quasi-employment as an elder', so on that basis, the "close connection test" was not satisfied and the appeal was allowed.

What effect this judgment will have on future cases against religious bodies for the sexual misdemeanours of their clergy and employees is impossible to guess; however, it seems that the scope of vicarious liability has just been somewhat narrowed.

[Source: CLAS, 26 April]

## EMPLOYMENT AND VOLUNTEERING

### Ethnicity pay reporting: guidance for employers

For information **and possibly for action**

The Department for Business and Trade has developed [guidance](#) to help employers who wish to analyse and report on their ethnicity pay to build transparency and trust between businesses and their employees. The Government has issued the guidance to help those employers who want to report their ethnicity pay data by providing a consistent approach that will allow for meaningful comparisons.

This guidance includes advice on:

- collecting ethnicity pay data for employees;
- how to consider data issues such as confidentiality, aggregating ethnic groups and the location of employees;
- the recommended calculations and step by step instructions on how to do them reporting the findings;
- further analysis that may be needed to understand the underlying causes of any disparities; and
- the importance of taking an evidence-based approach towards actions.

[Source: DBT, 17 April]

## FAITH & SOCIETY

### Humanist marriage ceremonies in England and Wales

For information

The UK Government has produced a briefing paper on the current legal status of humanist marriage ceremonies and the Law Commission's proposals for reforming the law relating to how and where marriages can take place in England and Wales.

The law in England and Wales permits both civil marriage and religious marriage. However, there is no specific provision for marriages to be conducted according to any non-religious system of belief, such as humanism – unlike in Scotland, where the law is quite different – so it is not possible to have a legally-binding humanist marriage in England and Wales.

The Government is considering wholesale reform of marriage law rather than piecemeal reform relating only to humanist marriage, which might create further anomalies.

[Source: Commons Library, 20 April]

### Does government 'do God?': recommendations of the Westminster Government's Independent Faith Engagement Adviser

For information

[Does government 'do God?'](#), the report by Colin Bloom, the Government's Independent Faith Engagement Adviser and a former Chair of the Conservative Christian Fellowship, has been published under the auspices of DLUHC. Mr Bloom's brief was to provide the Secretary of State with recommendations on how government should engage with faith groups in England. Its original aims were to identify:

- what the Government can do to recognise and support the contribution of faith organisations within communities;
- how best to break down barriers and promote acceptance between faith groups, including those of no faith or belief, and creating opportunities for co-operation;
- the steps that the Government can take to promote shared values and tackle cultures and practices that are harmful;
- how the Government can promote, in parallel to freedom of religion, the values of freedom of speech, democracy, the rule of law and equality; and

- how the Civil Service can improve its faith literacy and the steps the Government can take to ensure that it fully carries out its role in relation to faith and belief under the Public Sector Equality Duty.

The report makes 22 detailed recommendations. Many of them relate to issues such as radicalisation and sharia-compliant finance for students, but the following are likely to be of interest to members

Recommendation 1: Government should expand the role of the Prime Minister's Special Envoy for Freedom of Religion or Belief to include the promotion and protection of religious freedom in the UK.

Recommendation 2: Government should learn from the Faith New Deal pilot fund launched in September 2021 and consider ways of proactively partnering with places of worship in a Faith Partnership Charter to support their broader local community. By December 2023, every local council should be signed up to a Faith Partnership Charter with their places of worship.

Recommendation 3: Government should adopt working definitions for 'religion', 'belief' and 'faith' [which the report then goes on to define].

Recommendation 4: Government should take steps to ensure that everyone on the public payroll, including civil servants, local councils, NHS and public health staff, teachers in schools, colleges and universities, and police, prison and probation officers, are given consistent, high quality faith literacy training, overseen by the Independent Faith Champion's Office as outlined in recommendation 6. This should include training on the freedom of religion or belief enshrined in the Human Rights Act 1998 and Equalities Act 2010, greater understanding of faith-specific practices including the public expression of religious belief, awareness of intra-faith matters and sensitive issues such as forced marriages, and financial and other forms of faith-based exploitation.

Recommendation 5: Government should hold regular roundtables with "senior, serious [sic] and national" faith leaders. These should be governed by a sophisticated mechanism of discernment, with all groups having the right to speak and be heard at appropriate levels, to ensure fairness in output with a consistent outcome. (*Unserious faith leaders, presumably, need not apply.*)

Recommendation 6: Government should appoint an Independent Faith Champion with a well-resourced team of civil servants and sectoral experts to act as advisers and support government departments on both interfaith and intra-faith matters. It should have a broad, government-wide remit to ensure that government is successfully engaging with faith, people of faith and places of worship.

Recommendation 7: Government should look again at why religious education in schools has become the 'Cinderella subject' and should consider methods for improving the teaching of faith literacy and RE, with a view to cultivating a more inclusive society where people of all backgrounds are able to engage in debate about the different faiths and beliefs that shape society.

Recommendation 8: Government should ensure that 'out-of-school settings' which include faith-based settings operating below the current minimum threshold for registration as independent schools, and those that provide supplementary religious instruction, are properly registered and regulated (creating a new registration scheme and/or mandatory safeguarding reporting regime

governed by a centralised oversight body as necessary). They should also ensure appropriate resources are allocated to meet children's welfare and safeguarding requirements.

Recommendation 10: Government should begin an improvement review of chaplaincy services in prisons and pastoral support for people on remand and on probation. The review should focus on consistency across services, as well as exploring options for modern and effective support, including greater partnership with faith-based organisations that are well equipped to support the prison chaplaincy service.

Recommendation 11: Government should carry out an urgent review of the issue of prisoners allegedly being coercively converted and radicalised in prison, including by their peers, as well as the issue of faith-based gangs.

Recommendation 12: Government should explicitly integrate the use of religious or theological reflection as an important part of the rehabilitation of some offenders.

Recommendation 15: Government should continue to crack down on white supremacist and neo-Nazi terrorists and extremists who are using religion or religious imagery "to promote their hateful ideology".

Recommendation 17: The Government should use the provisions in the Online Safety Bill to exert much greater pressure on YouTube and other social media platforms to remove content uploaded by extremist groups (often intra-faith) which glorifies terrorist activity and is therefore illegal.

Recommendation 20: Government should amend the Anti-social Behaviour, Crime and Policing Act 2014 to make it a criminal offence for faith leaders conducting religious and civil weddings to do so without ensuring both participants have willingly entered into the marriage.

Recommendation 21: Government should redouble its efforts to tackle forced and coercive marriage by publicly adopting the term 'forced and coercive marriage' to address the full range of coercive behaviour and pressure in some religious-only or arranged marriages.

Recommendation 22: A review should be set up to investigate fully where existing legislation and policy are failing to prevent the crime of forced and coercive marriage, what further resources are needed, and what more can be done to meet the needs of victims and prevent others falling prey to these crimes.

[Source: HM Government, 26 April]

## ODDS & ENDS

### Being careful about copyright

**For information and possibly for action**

A charity concert at Cadogan Hall to raise money for the Help Musicians charity on 1 April mostly featured “humorous arrangements of out-of-copyright classical works”; however, it also included two songs by Earl Okin, a comedy performer of “suggestive jazz songs”. When the PRS for Music found out, it charged the organiser more than £1,000 – equivalent to up to half of the charitable earnings – because the pieces by Earl Okin are still in copyright. Okin later said that the situation was embarrassing, that he did not want the money and that if he received it he would send it on to the charity. *The Guardian* [reports](#) that PRS spokesperson said that the PRS was ‘working with the writer composers whose works were included in the 1 April concert at Cadogan Hall to ensure that they can identify all earnings from this concert’ – presumably so that they could be passed on.

The moral is that ***you can never be too careful about performing rights***. Music which is played or performed *within an act of divine worship* (either performed live or from a recording) does not currently require the cover of a licence because neither Phonographic Performance Ltd nor PRS for Music chooses to charge for it. That does *not* apply, however, to live performances or music soundtracks to films used or performed *outside* worship.

[Source: *The Guardian* and CLAS, 20 April]

## SCOTLAND

### OSCR: advice on making a referral to Disclosure Scotland

For information **and possibly for action**

OSCR has published [advice on charities making a referral to Disclosure Scotland](#). In brief, you must make a referral:

– when an individual has shown to have:

- harmed a child or protected adult;
- placed a child or protected adult at risk of harm;
- displayed inappropriate behaviour involving pornography;
- displayed inappropriate behaviour of a sexual nature involving a child or protected adult; or
- given inappropriate medical treatment to a child or protected adult.

– and, as a result, your organisation has:

- dismissed that individual
- would or might have dismissed that individual but they left before you could do this
- permanently moved the individual away from regulated work with children or protected adults.

[Source: OSCR, 17 April]

## TAXATION

### Tax Administration and Maintenance Day

**For information and possibly for action**

27 April was HM Treasury's and HMRC's "Tax administration and maintenance day", on which the Government published several responses to (mostly technical) consultations and issued some new ones. Of particular interest to CLAS, HMRC announced a consultation on charities tax compliance which will run until 20 July. Its declared intention is to explore with the charity sector "reasonable and proportionate" changes on how to reform some tax relief rules that do not work as intended. HMRC states that its purpose is help tackle non-compliance and protect the integrity of the sector and gives an assurance that any resulting changes 'would not detract from the overall generosity of the reliefs or be intended to catch out legitimate charities'. The following areas are being reviewed as part of the consultation:

- preventing donors from obtaining a financial benefit from their donation, and the operation of the Tainted Charity Donation rules;
- preventing abuse of the charitable investment rules;
- closing a gap in non-charitable expenditure rules (HMRC cites as an example using charity funds to purchase a foreign property for the sole use of its trustees as holiday home, with no other benefit to the charity – which is clearly a blatant abuse); and
- sanctioning charities that do not meet their filing and payment obligations.

HMRC suggests the possibility of withholding claims to reliefs such as Gift Aid until errant trustees submit a tax return and seeks views on the circumstances where this should apply. It does, however, concede that any change would need to be carefully targeted at cases where withholding was the appropriate response.

The last point, especially, needs a response. It is very easy for groups of small charities that submit a common tax return to get into difficulties if one of the elements in the consolidated accounts is defective. We are sure that HMRC intends to act proportionately, but it might be a good idea to remind officials of the problems of small charities without professional finance officers.

On Gift Aid: 'The Government will continue to engage with the charities sector to improve the way that Gift Aid works in order to minimise administrative burdens through the use of digital technology' – which is much to be welcomed.

[Source: HMRC, 27 April]