CLAS CIRCULAR
2009/18 (24 November 2009)

FAITH AND SOCIETY

Faith communities, social challenges and DCLG

Communities Secretary John Denham launched England's first-ever Inter Faith Week at the QEII Conference Centre in London with a speech on the relationship between Government and faith communities. Government already engages with faith communities through the Faith Communities Consultative Council (FCCC) where representatives of all the major religions are consulted on policy questions of mutual interest. He stressed that Government should respect the faith of citizens as something which, for many, shapes and defines who they are:

> But Government and politicians are also interested in how society can be shaped for the better. Whether it is parenting, personal health, or sustainability, Government is interested in what makes people tick. For millions of people the values instilled by their faith are central to shaping their behaviour. We should continually encourage and enhance the contribution faith makes on the central issues of our time.

He welcomed the fact that faith groups were working closely together to overcome social division, promote cohesion and build social capital. The efforts of faith groups to build relationships at a local level – not only amongst themselves, but also with the police, politicians and councils – had helped manage tension in the face of extreme provocation from right-wing extremists.

The Secretary of State used the occasion to confirm that the Government was making £2m available through the Faiths in Action programme to support projects which to bring together people of faith and people of no faith to overcome social division and promote cohesion. Faiths in Action is a £4m grants programme open to faith, interfaith, voluntary and community organisations and groups in England and is being distributed in two rounds. 216 grants of up to £12,000, totalling £2m, were distribute in round one in February 2009.

In addition to having intensive discussions with faith leaders, Denham is in the process of recruiting a panel of advisers to act as a sounding board on issues of faith and public policy and has appointed as his faith policy adviser Francis Davis, a Fellow of Blackfriars Hall and Director of the Las Casas Institute, Oxford, who directs the Hall's work on governance, social responsibility, faith and the public sphere.

[Source: *DCLG News* - 12 November 2009]

CLAS CIRCULAR
2009/19 (17 December 2009)

CHARITIES AND CHARITY LAW

Charity reporting and accounting: SORP

The Accounting Standards Board (ASB) has issued a new Financial Reporting Standard (FRS): *Improvements to Financial Reporting Standards 2009*.The amendments are a consequence of the International Accounting Standards Board's (IASB) annual improvements process. In April 2009 the IASB issued an International Financial Reporting Standard, *Improvements to IFRSs*, which made amendments to a number of International Financial Reporting Standards. The improvements to UK FRS are the same as those made to IFRS where the UK FRS is an IFRS-based standard. In addition, the ASB has amended FRS 11 *Impairment of Fixed Assets and Goodwill* in order to strengthen the disclosure requirements in the FRS. The amendments are similar to those made by the IASB to IAS 36 *Impairment of Assets*. The amendments set out in the FRS are based on the ASB's Financial Reporting Exposure Draft, *Improvements to Financial Reporting Standards* issued in June 2009.

All this will ultimately flow through into SORP: the *Statement of Recommended Practice, Accounting and Reporting by Charities*, so the Charity Commission and OSCR are running regional seminars on the future of charity reporting, giving participants a chance to hear the outcome of recent research on SORP and to discuss the ASB's plans for the future of charity accounting. The seminars are an opportunity to join the next stage of the debate for those who may have not had an opportunity to take part in the Conference to launch the research that took place on 4 December 2009. Places can be e-booked via the Charity Commission website at http://www.charitycommission.gov.uk/investigations/sorp/comresearch.asp.

The locations and contact points for e-booking the seminars are as follows:

- Edinburgh 7 January 2010: for more details e-mail Laura Anderson: laura.anderson@oscr.org.uk.
- Belfast 11 January 2010: hosted by Queen's University Belfast and to be addressed by Professor Noel Hyndman, who led the research analysis team: to book a place, e-mail Karen Close: k.close@qub.ac.uk.
- Sheffield 12 January 2010: an all-day conference to be addressed by Andrew Hind, Chief Executive of the Charity Commission: a fee is payable of £65 provided booking is made by 21 December: book at Sheffield Hallam University Centre for Voluntary Sector Research http://www.shu.ac.uk/research/cvsr/events.html.
- Dublin 12 January 2010 at Dublin Castle: organised by the Department of Community, Rural and Gaeltacht Affairs and to be addressed by Sheila Nordon of Irish Charities Tax Research Ltd.
- Cardiff 14 January 2010 (at which there are only 40 places available): to book, e-mail Nigel Davies: nigel.davies@charitycommission.gsi.gov.uk.

The Queen's University Belfast research report on the SORP roundtables will be published in pdf format in late December on the Charity Commission and OSCR websites. Free copies will be available at some of the seminar events.

[Source: *Charity Commission for Northern Ireland Website* – 8 December 2009]

EMPLOYMENT

Equal treatment

On 20 November the European Commission announced that is had sent a reasoned opinion to the United Kingdom stating that it had incorrectly implemented EU rules prohibiting discrimination based on religion or belief, disability, age or sexual orientation in employment and occupation. In the reasoned opinion the Commission pointed out that in UK law:

- there is no clear ban on 'instruction to discriminate' in national law and no clear appeals procedure in the case of disabled people; and
- exceptions to the principle of non-discrimination on the basis of sexual orientation for religious employers are broader than that permitted by the Directive.

In response, the Government said that it was studying the reasoned opinion in the expectation of responding early in 2009. Churches have already expressed disquiet at the way in which the Equality Bills narrows the current exception in the Employment Equality (Religion or Belief) Regulations 2003.

Perhaps coincidentally, the issue of the 2003 Regulations surfaced shortly afterwards in the Court of Appeal. Ms Lillian Ladele, a civil partnership registrar, had asked to be excused from conducting civil partnership ceremonies because she could not reconcile that duty with her Christian faith because she believed that civil partnerships were contrary to the will of God. Her employers had refused.

At first instance an employment tribunal found in her favour, but that decision was reversed by the Employment Appeal Tribunal. On a further appeal, the Court of Appeal decided in *Ladele v London Borough of Islington* [2009] EWCA Civ 1357 (15 December 2009) that the Employment Equality (Religion or Belief) Regulations 2003 did not give Ms Ladele the right on religious grounds to refuse to carry out civil partnership duties. In a judgment delivered by the Master of the Rolls, Lord Neuberger of Abbotsbury, the Court agreed with the Employment Appeal Tribunal that Ms Ladele was neither directly nor indirectly discriminated against nor harassed contrary to the 2003 Regulations as a result of being designated a civil partnership registrar, by being required to officiate at civil partnerships, or by any other aspect of her treatment by Islington London Borough.

Unlike the Employment Appeal Tribunal however, the Court of Appeal addressed the conflict of rights issue: whether the provisions of the Equality Act (Sexual Orientation) Regulations 2007 overrides Article 9 of the European Convention on Human Rights (freedom of thought, conscience and religion). The Court concluded that, except in the limited circumstances provided for in Regulation 14, the prohibition of discrimination in the 2007 Regulations takes precedence over any right which a person would otherwise have by virtue of his or her religious belief to practise discrimination on the ground of sexual orientation.

Article 9(2) states that the right to manifest religion or belief 'shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society' for, *inter alia*, 'the protection of the rights and freedoms of others'. The Court concluded that the rights protected by Article 9 are qualified and, following the decision of the European Court of Human Rights in *Campbell and Cosans v United Kingdom* [1982] 4 EHRR 293, that only beliefs 'worthy of respect in a democratic society and… not incompatible with human dignity' are protected. The Court quoted with approval Lord Hoffmann's conclusion in *R(SB) v Governors of Denbigh High School* [2007] 1 AC 100 para 50 that 'Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing'. Ms Ladele's conscientious objections could not, therefore, override her employer's concern that all its registrars should manifest equal respect for homosexuals as for heterosexuals because:

> … the legislature has decided that the requirements of a modern liberal democracy, such as the United Kingdom, include outlawing discrimination in the provision of goods, facilities and services on grounds of sexual orientation, subject only to very limited exceptions. (para 73).

Comment: The case involved a straight conflict of rights; and the Court of Appeal decided that the right to freedom of thought, conscience and religion did not override rights under Article 8 (private and family life). On the contrary, Lord Neuberger quoted with approval the conclusion in *EB v France* (2008) 47 EHRR 21 that '[w]here sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within Article 8'. It remains to see whether there will be a further appeal to the Supreme Court.

[Sources: *EC Employment, Social Affairs and Equal Opportunities News* – 20 November 2009; BAILII – 15 December 2009]

National Minimum Wage

Whether or not an employer is complying with the National Minimum Wage Regulations depends on the *basic rate of pay* of the employee, not pay after bonuses or allowances, even if that employee normally only works nights or weekends and receives enhanced pay as a result. An Employment Appeal Tribunal (HHJ Ansell sitting alone) so held in *Hamilton House Medical Ltd v Hillier (Rev 1)* [2009] UKEAT 0246_09_2511 (25 November 2009).

In that case, Ms Hillier normally worked nights and weekends. Because of that, though her hourly rate of pay was below the National Minimum Wage (NMW) threshold, her *actual* payments were for time plus one-third for weekday nights and time plus two-thirds for weekend nights – so the total came to more than the NMW. However, the Tribunal rejected the contention that because Ms Hillier was being paid more than the NMW as a result of the unsocial hours enhancement, the Appellant was therefore complying with the Regulations:

> The philosophy of the National Minimum Wage Regulations is clearly that an employee's basic minimum wage before overtime enhancement or other allowances

> should not fall below the statutory minimum and… it would be completely contrary to the purpose of the legislation if that obligation could be avoided simply because an employee chooses to normally work those hours when she would be in receipt of some enhancement.

[Source: *BAILII* – 26 November 2009]

FUNDING

Gift aid

HM Treasury and HMRC have published the results of the research that they commissioned on the possible effects of redirecting Gift Aid higher-rate relief from donors to charities. *Gift Aid donor research: Exploring options for reforming higher-rate relief* is a study by academics at Bristol and Warwick. The research team, which used both quantitative methods and interviews, was asked to consider two possible options:

- *Redirection*, under which higher-rate taxpayers would no longer be able to reclaim the additional 25 pence higher-rate relief; instead charities could reclaim 50 pence for every £1 donated out of net-of-tax income by HRTs. For basic-rate taxpayers, charities would still reclaim 25 pence for every £1 donated.

- A *composite rate*, under which higher-rate relief would be eliminated and charities could reclaim at some rate (anywhere between 25 pence and 50 pence per £1) that would apply equally to higher-rate and basic-rate donors: the research focused on two composite rates of 30 pence and 37 pence per £1 pound donated out of net-of-tax income.

The main conclusions are as follows:

Claiming higher-rate relief

- Only about 35 per cent of higher-rate donors claim the rebate – though the ones who do so are estimated to account for nearly 80 per cent of the total value of donations from higher-rate donors.

- Many people are not aware that they can reclaim higher-rate relief, while more than 30 per cent of non-reclaimers said that they did not know how to claim it back.

- Nearly one-third of those who did not reclaim said that it took too much time and effort.

Effect of tax-changes on behaviour

- The majority of donors of all three taxpayer groups (basic-rate, higher-rate non-reclaimers and higher-rate reclaimers) said that they would not change their donations out of net-of-tax income if faced with changes to Gift Aid.

- When asked why they would not adjust their donations if the tax system were to change, the majority said that it was because they decided how much to give before thinking about the tax incentives – and the researchers conclude that this may be a consequence of the complexity of the current system.

- Given a choice, most higher-rate donors appeared to prefer a system that would channel all higher-rate relief to charities.

- A key theme from the interviews was that changing the tax system would make little difference to the behaviour of major donors: some would simply adjust their giving to maintain their level of net donation while others thought it would have little effect even on their cash donations.

- The quantitative research suggested that, even among donors who give more than £10,000 a year, gross donations are more sensitive to changes in the amount that goes to charity than to changes in the amount of rebate.

Overall, tax considerations appear to be only a secondary consideration for most donors, except for the super-rich who sometimes use charitable gifts as part of tax-planning.

What all this means remains to be seen. Jeremy Sherwood, of HM Treasury, made it clear in his introduction at the launch of the research findings that, given the current financial circumstances, any change would have to be broadly fiscally neutral. In any case, with a general election fast approaching it is unlikely that the forthcoming Finance Bill will contain anything much more than the basic 'steady as she goes' continuation of existing taxes.

[Source: *HM Treasury website* - 15 December]

CLAS CIRCULAR
2009/20 (22 December 2009)

FAITH & SOCIETY

Equality Bill

A disturbing report about the likely consequences of the Equality Bill has appeared in the *Daily Telegraph*. Michael Foster, the Minister for Equality, is reported as saying at a briefing for the religious press that the Bill, once enacted, might give rise to religious and sexual discrimination cases against faith communities. Asked whether the Bill would lead to legal action between churches and atheists, he replied:

> Both need to be lining up [their lawyers] by now. The secularists should have the right to challenge the Church and if the Church's argument is good enough – which I believe it is – then the Church should win through. Government is used to the fact that its legislation should be challenged [in the courts]. People feel very strongly about these issues. We can't do anything about this and we wouldn't want to. I would like to see the Churches being more bold. I would like to see the faith groups stand up and be counted for what they think and to challenge secularism, if that's what they want to challenge.

Neil Addison, a barrister and author of *Religious Discrimination and Hatred Law*, said it was 'completely misleading and untrue' for the Government to claim that the Bill simply consolidates existing law:

> The trouble is that the Government is passing vague legislation and then saying 'well, the courts will sort it out'. But the law should be as certain as possible. Courts should not become the arena in which these issues are fought out.

[Source: *Daily Telegraph* – 19 December 2009]

Equality Bill: gender reassignment and religious marriage

The following has been brought to our attention by The Revd Alexander McGregor, Deputy Legal Adviser to the Archbishops' Council and the General Synod.

As the law currently stands, religious marriages are not covered by the gender reassignment provisions of the Sex Discrimination Act 1975 (as amended by regulations made under the European Communities Act) because those provisions expressly exclude from their coverage the 'provision of goods, facilities and services (not normally provided on a commercial basis) at a place (permanently or for the time being) occupied or used for the purposes of an organised religion'. The Equality Bill does not contain a similar exclusion. Under Clause 29 of the Bill as it currently stands, it is unlawful to discriminate (including on grounds of gender reassignment) in the provision of a 'service' (which includes the provision of 'facilities') to the public or in the exercise of a public function.

When the Church of England's Legal Department raised this with officials at the Government Equalities Office they said that they had had legal advice that conducting marriages was neither a 'service' nor the exercise of a public function.

The Church of England's lawyers do not agree (and, for what it's worth, neither does CLAS). While it may be arguable that conducting marriages is not a 'service' in the sense that that expression is used in the Bill, it is undoubtedly a public function: see the observations to that effect in the judgments in *PCC of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank & Anor* [2003] UKHL 37 (26 June 2003).

Section 5B of the Marriage Act 1949 (which was inserted into the Act by the Gender Recognition Act 2004) allows a cleric of the Church of England or the Church in Wales to refuse to solemnize the marriage of a person whom he or she reasonably believes to be of an 'acquired gender' under the 2004 Act. (In the case of the Church in Wales, it also allows the minister in charge of a church or chapel to refuse to allow the building to be used in similar circumstances.) These exceptions were included to give Anglican clergy in England and Wales an opt-out for reasons of conscience because, exceptionally, they are otherwise obliged by common law to conduct the marriages of parishioners. However, the opt-out from the common law duty to marry parishioners would not provide a defence to a claim of discrimination under the Bill, because where the Bill intends to preserve existing opt-outs and other statutory exceptions *it does so expressly*. Because of this, in order to preserve the *status quo* an overt exception is needed.

Alex McGregor thinks that an exception is also required for the clergy (and trustees of registered buildings) of other denominations who conduct marriages under Part 3 of the Marriage Act. If Anglican clergy are exercising a public function when conducting marriages then, he suggests, it would be difficult to argue that other religious groups are not in the same position when doing so. This did not require any express provision in the past because (unlike Anglican clergy in England and Wales) religious groups generally were not subject to any common law duty to marry any class of persons; however, under the current proposal they now seem to need an exception. He has drafted an amendment to cover the point so far as England and Wales is concerned, in the hope of having it moved successfully in the Lords.

Hardly any of the Bill extends to Northern Ireland but it *does* extend to Scotland. Janette Wilson has been in touch with members of the Scottish Churches Committee as to whether or not a similar amendment is needed to cover approved celebrants under section 8 of the Marriage (Scotland) Act 1977. The consensus is in the affirmative; so the intention is to tack an exception for approved celebrants under section 8 of the Marriage (Scotland) Act 1977on to the amendment already drafted for England and Wales.