

CLAS CIRCULAR 2015/15 (23 July 2015)

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 undertake 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 AND CHARITY LAW	2
Charities (Protection and Social Investment) Bill	2
<i>The Essential Trustee</i>	2
FAITH & SOCIETY	4
Faith Minister's identity revealed	4
Law Commission preliminary consultation on marriage law	4
Lords debate on freedom of religion and belief.....	5
FUNDING	6
House of Commons inquiry into fundraising.....	6
Gift Aid donor benefit rules: call for evidence	6
ODDS & ENDS	8
"Freedom of Panorama": update	8
Lobbying Act: final guidance	8
SAFEGUARDING AND THE GODDARD INQUIRY	10
The inquiry.....	10
Terms of Reference	10
Scope	11
Structure of the inquiry	11
Potential impact on relevant sectors	13
Recommended action	14

CHARITIES AND CHARITY LAW

Charities (Protection and Social Investment) Bill

For information

The Charities (Protection and Social Investment) Bill, [as amended](#), is currently awaiting third reading in the Lords. During the course of proceedings an amendment was made at report stage which would pre-empt the proposed right to buy for housing association tenants in the forthcoming Housing Bill:

“Conduct of charities: disposal of assets

The Charity Commission shall ensure that independent charities are not compelled to use or dispose of their assets in a way which is inconsistent with their charitable purposes.”

We assume that the Government will seek to remove this in the Commons.

[Source: Parliament website – 20 July]

The Essential Trustee

For action: ***ALL trustees should read it***

The Charity Commission has [published](#) its updated version of [The Essential Trustee](#) (CC3) following consultation in 2014 to which CLAS contributed. The updated guidance (which is also available as a [pdf](#)) breaks down the trustee's role into six clear duties:

- To ensure that the charity is carrying out its purposes for the public benefit
- To comply with the charity's governing document and the law
- To act in the charity's best interests
- To manage the charity's resources responsibly
- To act with reasonable care and skill
- To ensure that the charity is accountable.

The guidance explains the general duties on trustees and the good practice that must be followed order to operate effectively and to comply with trustees' legal obligations. The guidance has hyperlinks to more in-depth material (on topics such as fundraising, reducing the risk of liability and making better decisions) and a [summary guide](#) for those who want the headlines at a glance.

Every charity trustee in England and Wales ought to read the guidance, whether the charity concerned is registered with the Charity Commission or not. As the guidance explains:

“Trustees who act in breach of their legal duties can be held responsible for consequences that flow from such a breach and for any loss the charity incurs as a result. When the Commission looks into cases of potential breach of trust or duty or other misconduct or mismanagement, it may take account of evidence that trustees have exposed the charity, its assets or its beneficiaries to harm or undue risk by not following good practice.”

Trustees of church charities (such as members of Church of England PCCs and similar bodies in other Churches whose members are the default trustees of the charity) sometimes tend to think of themselves as representatives of the congregation first and foremost. But *charity trusteeship involves serious legal obligations and every trustee is personally responsible for acting in the interests of the trust* – and ignorance is a recipe for poor decision-making. It should also be remembered that *unregistered charities are bound by charity law just as much as registered ones.*

[Source: Charity Commission – 9 July]

FAITH & SOCIETY

Faith Minister's identity revealed

For information

Last week the Government made a very low-key [announcement](#) (in fact, so low-key that we only picked it up via Twitter) that the faith portfolio previously held by Baroness Warsi and Eric Pickles has been given to Baroness [Susan] Williams of Trafford, Parliamentary Under Secretary of State for Communities and Local Government. Gov.uk lists her responsibilities as follows:

- Departmental business in the House of Lords
- Local government finance and policy
- Integration and faith
- HS2
- Travellers
- Supporting the Secretary of State on City Deals and Troubled Families
- Women and equalities, including race equality (supporting the Department for Education in the Lords).

We assume that the last of these means answering questions and debates in the Lords, rather than having any administrative responsibility within the Department for Education.

[Source: Gov.uk – 12 July]

Law Commission preliminary consultation on marriage law

For information

The Government has asked the Law Commission to conduct a review of the law governing how and where people can marry in England and Wales. The question underlying the review would be whether the current law provides a fair and coherent legal framework for enabling people to marry. Does the law allow people to marry in a way that meets their needs and wishes while recognising the interests of society and the state in protecting the status of marriage?

The Commission is *not*, in any event, going to consider:

- Who can be married – so there will be no consideration of changing the age of consent or the restrictions on marrying within prohibited degrees.
- Whether or not religious groups should be obliged to solemnize marriages of same-sex couples.
- The rights or responsibilities which marriage confers, such as the financial entitlements of surviving spouses or the consequences of divorce.

The Commission has agreed to carry out a preliminary study, which it expects to complete by the end of 2015, involving research on domestic and comparative law and engagement with key stakeholders. Once its findings are published it will consider the next steps in consultation with Government.

The Commission has fixed a preliminary meeting for late August: the Secretary of CLAS hopes to attend.

[Source: Law Commission for England & Wales – July 2015]

Lords debate on freedom of religion and belief

For information

On 16 July the House of Lords [debated](#) a motion moved by **Lord Alton of Liverpool** (Crossbencher), as follows:

"That this House takes note of worldwide violations of Article 18 of the 1948 Universal Declaration of Human Rights and the case for greater priority to be given by the United Kingdom and the international community to upholding freedom of religion and belief".

It was a wide-ranging discussion: there is a summary [here](#).

[Source: Lords *Hansard* – 16 July]

FUNDING

House of Commons inquiry into fundraising

For information

The House of Commons Public Administration and Constitutional Affairs Committee has announced an inquiry into fundraising in the charitable sector. It will focus on four key areas:

- the extent and nature of practices adopted by call centres raising funds for charities and the impact on members of the public, particularly vulnerable people;
- the Government's recently proposed legislative changes on this issue;
- how charities came to adopt these methods, and how they maintained proper governance over what was being done on their behalf; and
- the leadership of charities and how their values are reflected in their actions and activities.

This is probably only of marginal interest in terms of members' own fundraising practices; however, members may have views on the more general issue of the reputational effect of the wider debate on regulation of fundraising.

The deadline for submissions is **noon on Wednesday 26 August 2015**. An evidence session will be held in early September. Written submissions should be submitted via the [Fundraising in the Charitable sector inquiry page](#).

[Source: House of Commons website – 21 July]

Gift Aid donor benefit rules: call for evidence

For information

HM Treasury has opened a [call for evidence](#) relating to the existing Gift Aid donor benefit rules. It invites evidence that will help the Government to understand exactly how the current rules are understood and applied, what – if any – barriers and problems they present for charities and how they might be improved. Respondents are invited to submit anonymised data to support their responses. Though this evidence can be supplied in any convenient format, the Treasury has provided a template for reference purposes, available [here](#).

The call for evidence is split into several sections, with questions in each of them (though general comments are also welcomed in the form of a covering letter). The headings are as follows:

- Factual understanding of the current rules,
- General usage and rationale,
- Membership benefits,
- Extra-statutory concessions, and
- Admissions disregards.

Responses can be submitted by email to: charitypolicy.taxteam@hmrc.gsi.gov.uk or by post to: Donor Benefits Call for Evidence, Room G66, 100 Parliament Street, London SW1A 2BQ. The deadline for responses is **9 October 2015**. The Church of England's parish resources website has a helpful [guide](#) to the existing rules – which largely goes to prove how complex they are.

We suspect that the donor benefit rules do not loom large in the deliberations of the average church congregation because, on the whole, individual churches do not provide gifts to donors (or, if they do, they're trivial – like coffee and biscuits on Sunday morning after service). Where the rules might possibly be of more impact, however, is in relation to other church-related charities, such as church schools and further and higher education establishments.

We shall be thinking very hard about how to respond and would be very grateful if any member who decides to submit an individual response could copy us in.

[Source: HM Treasury – 16 July]

ODDS & ENDS

“Freedom of Panorama”: update

For information

As we reported in Circular 2015/14, the Legal Affairs Committee of the European Parliament put forward a proposal drastically to limit the so-called Freedom of Panorama as part of a move towards streamlining European-wide copyright law. Under the Committee’s proposal, members of the public would have been obliged to secure prior permission from architects or rights-holders before sharing pictures of architectural landmarks or works of art on social media where the designer or creator was still alive or had died within the past 70 years.

Potentially at least, this could have had very serious consequences for CLAS members operating church websites; and we are relieved to announce that on 9 July the European Parliament [rejected](#) the proposal, with 502 MEPs voting against it.

Julia Reda, sole MEP for the Germany Pirate Party, [welcomed](#) the fact that the Plenary had removed the offending addition to the text of her original report but warned that:

"the fact that the attack on freedom of panorama for a time enjoyed the support of a majority demonstrates that many MEPs have yet fully to understand the cultural shift caused by the Internet and its consequences for copyright. Much work remains until we have a European copyright framework fit for the digital age."

We fear she’s right and we have not heard the last of this.

[Source: European Parliament – 9 July]

Lobbying Act: final guidance

For information

The Electoral Commission has published its [final guidance](#) (no. 16) on non-party campaigning following the enactment of the Transparency of Lobbying (etc) Act 2014, which covers the following:

- Where to find the template auditors report
- Government review of third party spending

- The Commission's report on the 2015 election
- May 2016 polls
- How to sign up for the Commission's referendum updates.

[Source: Electoral Commission – 21 July]

SAFEGUARDING AND THE GODDARD INQUIRY

For information and for action

Adele Eastman, of Farrer & Co (a Professional Member of CLAS) has prepared the following note on the opening of the Independent Inquiry into Child Sexual Abuse in England and Wales and Farrer & Co has been kind enough to allow us to share it. The major denominations are already working on their own investigations in response to the Goddard Inquiry: some of the smaller ones may not be. Ms Eastman's summary includes some helpful advice on how to proceed.

The inquiry

On 4 February 2015 the Home Secretary announced that she would be appointing Justice Lowell Goddard, a judge of the New Zealand High Court, as Chair of the newly constituted Independent Inquiry into Child Sexual Abuse, established under the Inquiries Act 2005. The statutory Inquiry was established on 12 March 2015, when the Home Secretary also announced the panel members: Malcolm Evans OBE, Ivor Frank, Professor Alexis Jay OBE and Drusilla Sharpling CBE. Ms Justice Goddard took up her position on 13 April 2015.

The Inquiry officially opened on 23 June, when Ms Justice Goddard gave an opening statement and, following nearly four months of preparation, provided further detail regarding its aims, structure and approach. In her opening statement, she emphasised that "this is the largest and most ambitious public inquiry ever established in England and Wales." She described the task ahead as "daunting." The Inquiry is calling for information from victims and survivors of child sexual abuse, as well as "from those involved or formerly involved in the care of children, and from institutions under investigation." She confirmed that the Inquiry has no cut-off date and that it "may require inquiries to be made about events occurring many years or even decades ago." She explained that it is her "sincere hope and expectation that it will be possible to conclude the Inquiry's work before the end of 2020." In the meantime, the Inquiry intends to publish regular annual reports, containing recommendations, starting from 2016. It will also publish more frequent updates on its work as it progresses.

Terms of Reference

The Inquiry's Terms of Reference are broad. The Inquiry will:

- consider the extent to which State and non-State institutions in England and Wales have failed in their duty of care to protect children from sexual abuse and exploitation;
- consider the extent to which those failings have since been addressed;
- identify further action needed to address any failings identified;

- consider the steps which it is necessary for State and non-State institutions to take in order to protect children from such abuse in future; and
- publish a report with recommendations.

The Inquiry will consider information from published and unpublished reviews, cases and investigations concluded to date, and the experience of victims and survivors of child sexual abuse. It will liaise with on-going inquiries, including those currently being conducted in Northern Ireland and Scotland. It will advise on any further action needed to address any institutional protection gaps within current child protection systems on the basis of the findings and lessons learnt from the Inquiry, and will disclose any documents (where appropriate and in accordance with relevant protocols) which were considered as part of the Inquiry. It will produce regular reports and an interim report by the end of 2018, and to conduct the work of the Inquiry in as transparent a manner as possible.

Scope

The scope of the Inquiry is also wide ranging. It includes government, local authorities, police, schools (independent and state), health services, prison services, [churches and religious organisations](#), political parties, and the armed services. As highlighted by Justice Goddard yesterday, "the Terms of Reference include all state and non-state institutions, not solely those with direct child protection responsibilities."

At the same time, Operation Hydrant, a dedicated national police team established last summer, is coordinating multiple historical child sexual abuse investigations around the country, involving people of public prominence and/or abuse which has taken place in an institution. These investigations include the above sectors, as well as the entertainment and sports industries. A team from Operation Hydrant is liaising closely with the Inquiry – sharing information to support its work. The officer leading Operation Hydrant has indicated that the number of victims could run into the hundreds of thousands. In 2015 alone, he anticipates that an estimated 116,000 reports of child sexual abuse will be received – a 71% increase since 2012; roughly 45% of these are allegations of sexual abuse from the past (an increase of 166%), with 55% relating to current cases. Hundreds of institutions are reported to have been identified by victims of non-recent abuse as places where they suffered abuse.

Structure of the inquiry

The Inquiry has the power to compel the attendance of witnesses and the production of evidence. The relevant legislation (Section 21, Inquiries Act 2005) empowers Justice Goddard, by notice, to require a person to:

- provide documents in their custody or under their control;
- provide a written statement;
- produce any other thing for inspection, examination or testing; and

- attend to give evidence.

In a nutshell, as emphasised by Ben Emmerson, QC, counsel to the Inquiry, it will have "all the powers it needs to penetrate deeply into the institutions that have failed children in the past, and to identify those institutions that are reportedly continuing to fail children today."

Justice Goddard has stated that "it is...an offence for a person, during the course of an Inquiry, to destroy, alter or tamper with evidence that may be relevant to an Inquiry, or deliberately to do an act with the intention of suppressing evidence or preventing it being disclosed to the Inquiry." She confirmed that she has written, with retention instructions, to a total of 243 institutions (copies of her letters are available on the Inquiry's [website](#)).

She added: "No institution – whether they have received a letter or not – can be in any doubt of the extent of their duty to preserve records for the Inquiry, or of the consequences of failing to do so." We would advise institutions to take immediate steps to prevent the destruction of any files or data relating to children in their care or the staff who looked after them, and for the time being to suspend any routine destruction of such files under data protection legislation.

The Inquiry has divided the institutional sectors covered by its Terms of Reference into five broad work-streams, each of which will be led by the Chair, or a member of the Inquiry Panel, as follows:

- Allegations of abuse by people of prominence in public life – led by Justice Goddard;
- Education and religion – led by Professor Malcolm Evans OBE;
- Criminal Justice and law enforcement - led by Drusilla Sharpling CBE;
- Local authorities and voluntary organisations – led by Professor Alexis Jay OBE;
- National and private service organisations – led by Ivor Frank.

The Inquiry will be guided by three principles: it will be comprehensive, inclusive and thorough. The Inquiry's work will be divided into three core projects:

- The Research Project: led by an expert Academic Advisory Board, it will involve a comprehensive literature review to collate, for the first time, analysis of all the published work addressing institutional failures in child protection;
- The Truth Project: will enable victims and survivors of child sexual abuse to share their experiences with the Inquiry, with the option of doing so in a private session with a member of the Inquiry. Their accounts will not be tested, challenged or contradicted. The process will have no direct legal consequences. The Inquiry will not make individual factual findings on the basis of what is said during the private sessions. However, the information will be recorded, anonymised and aggregated for the purpose of analysis and will feed directly into the Inquiry's research and analytical work. This is expected to enable the Inquiry to piece together a broader picture of the scale and nature of institutional child sexual abuse in England and Wales; and to enable the Inquiry to reach conclusions about why such crimes

went unreported, and undetected, for so long. The first Truth Project sessions are likely to start in October 2015;

- The Public Hearings Project: will resemble a conventional public inquiry, where witnesses give evidence on oath and are subject to cross-examination. The Inquiry will select case studies from a range of institutions that appear to illustrate a wider pattern of institutional failings. At least five institutions will be chosen for each of the work-streams above. Evidence is likely to be taken from both representatives of the institutions under investigation and from victims and survivors of sexual abuse. Each hearing will last for approximately six weeks and up to 30 separate hearings are expected to be held. Collectively, the evidence heard in the range of case studies will assist the Inquiry in drawing conclusions about the patterns of child protection failings across a range of institutions in England and Wales.

The Inquiry does not have the power to convict abusers of criminal offences or to award compensation to victims and survivors. However, it will use its fact-finding powers fully to make findings against named individuals or institutions where the evidence justifies it. The first Public Hearings are likely to start in 2016.

Collectively, the evidence obtained by the Inquiry across each of the three projects will inform its overall conclusions and recommendations.

Justice Goddard has emphasised the central part that victims and survivors of child sexual abuse are expected to take - their experiences "will be the core currency of the Inquiry." A Victims and Survivors' Consultative Panel (VSCP) has been established – comprising 8 individuals nominated by victims and survivors. The VSCP will provide advice and guidance to the Chair and panel; its work is expected to commence soon. In addition, a broader less formal network of victims and survivors has been set up – a forum to "allow for wider participation in the work of the Inquiry."

Potential impact on relevant sectors

Given the nature of both the Inquiry and of Operation Hydrant feeding in to it, one of the possible implications for institutions with a duty of care to protect children is that people who have suffered child sexual abuse and those with information about institutional failings are now being encouraged to come forward. This is likely in turn to prompt further criminal investigations and, further down the line, claims.

Various institutions across the sectors covered by the Inquiry will inevitably be contacted in due course to give evidence to it. In fact, any institution that has featured in the press in the context of a recent or historic child sexual abuse case could well be approached by the Inquiry.

We think it likely that the Inquiry will focus on what action was taken at the time by the institutions to notify relevant authorities and what steps were taken subsequently by the institutions to re-examine the effectiveness of their procedures. Whilst it is not part of the Inquiry's function to

determine civil or criminal liability of named individuals or organisations, the Inquiry may still reach findings of fact relevant to its Terms of Reference.

Recommended action

In the circumstances, we would advise:

- all institutions to take immediate steps to ensure the preservation of all documents relating to the care of children in line with Justice Goddard's letter to institutions ([click here](#));
- all institutions to be proactive in terms of reviewing their safeguarding and child protection training, policies and procedures - to ensure that they are sufficient and water-tight; and
- any institution that has faced allegations of child sexual abuse to review any such case(s) as to whether:
 - action was taken in response to the allegations;
 - if action was taken, whether it was sufficient to address any failings on the institution's part;
 - any further action is required to address any failings identified;
 - any further action is necessary in order to protect children from such abuse in the future;
 - relevant documents relating to any incidents have been preserved (and, if so, to ensure that they continue to be); and
 - as is necessary, liaise with any insurer who may be on record to cover a claim.

As Justice Goddard concluded she laid down a challenge to institutions that have, or have had, a duty of care to protect children from sexual abuse:

"I urge you to take a proactive stance towards the Inquiry – to review your files, records and procedures voluntarily and to take the initiative to self-report instances of institutional failure – rather than waiting for us to come and see you. Above all, review your current safeguarding policies to make sure that they are consistent with best practice, and take whatever steps you can to provide a safer environment for children now."

[Source: Farrer & Co – 10 July]

Farrer & Co has asked us to remind readers that this publication is a general summary of the law. It should not replace legal advice tailored to your specific circumstances. If you require further information on anything covered in this briefing please contact Adele Eastman (adele.eastman@farrer.co.uk: 020 3375 7581).